TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 622 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED JANUARY 3, 1901.

(18,011.)

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vs.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 3, 1901.

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1 Be it remembered that heretofore, to wit, on the 8th day of October, 1898, came Henry C. King, by his counsel, and filed his bill of complaint against S. D. Hatfield and Nancy C. Rutherford; which said bill of complaint is in the words and figures following to wit:

In the Circuit Court of the United States for the District of West Virginia.

To the honorable judges of said court:

Henry C. King, of the city of New York, a citizen and resident of the State of New York, brings this his bill against S. D. Hatfield and Nancy C. Rutherford, citizens and residents of the State of West Virginia; and thereupon your orator complains and says:

That this is a suit of a civil nature in equity arising under the Constitution of the United States and in which there is a controversy between citizens of different States and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of five thousand dollars and in which it is claimed that the Constitution and laws of a State, to wit, the State of West Virginia, contravene the Constitution of the United States.

That your orator is the owner in fee and is in the actual possession of a certain tract of land situate partly in said district, in the counties of Wyoming, Logan, Mingo, and McDowell, and partly in the States of Kentucky and Virginia, which tract of land, commonly known as the "Robert Morris 500,000-acre grant," was granted to the Honorable Robert Morris, of Philadelphia, by the Commonwealth of Virginia by letters patent dated June 23rd, 1795, being described therein as follows, viz: "A certain tract or parcel of land containing 500,000 acres by survey bearing date the 28th day of October, 1794, lying and being in the counties of Wythe and Russell, the greater part thereof in the former, on Sandy and Gyandotte rivers and the waters thereof, and is bounded as followeth, to wit:

(Further description omitted by direction and agreement of parties.—Clerk.)

2 That your orator derives title to said land as follows: Said Robert Morris granted and conveyed said land so patented to him as aforesaid by deed dated November 16th, 1796, or by a deed therein mentioned, to James Swan, who afterwards, and prior to the year 1838, departed this life in Paris, France, insolvent and heavily indebted to numerous persons, chiefly French army officers who had served with him in the war for American independence. The said tract of land, together with other tracts belonging to said Swan having become forfeited to the Commonwealth of Virginia, or to the literary fund thereof, for non-payment of taxes thereon, and the title thereto being vested in said Commonwealth, or said literary fund, the General Assembly of said Commonwealth, by an act passed and adopted March 15th, 1838, entitled "An act to amend an act entitled

'An act to amend and explain the law concerning western land titles and for other purposes,'" which is made a part of this bill, released said land from all arrears of taxes and vested the title to said land in John Peter Dumas, as trustee, for the benefit of the creditors of said Swan, with full power to sell and convey same.

On or about the 2nd day of December, A. D. 1847, said Dumas died seized of said land as such trustee, and by an order of the circuit court of Virginia, for the county of Kanawha (now in West Virginia) in which county a part of said "Swan estate" was situate, made and entered on the 1st day of June, A. D. 1855, in the chancery cause then pending in said court, entitled "Dumas *et als. vs.* D'Hue De Monsignon *et als.*" Josiah Randall, of Philadelphia, Pennsylvania, was appointed trustee in place and stead of, and invested with all the estate and power of, said Dumas, trustee, and the said Josiah Randall having died on or about 10th day of September, A. D. 1866, seized of said land, as such trustee, Robert E. Randall, of said Philadelphia, was duly appointed his successor in said trust by order duly entered in the last-named court and cause on the 3rd day of October, A. D. 1866, and by an order duly entered on the 20th day of May, 1867, in the circuit court of Virginia for the county of Wythe, wherein part of said Swan estate was situate, in the chancery suit therein pending entitled "Randall's Executors *vs.* Puget *et als.*"

On the 29th day of June, 1886, the said Robert E. Randall resigned his said trust and John R. Read, of said Philadelphia, was duly appointed in the place and stead of said Randall, by order that day duly entered in this court — consolidated causes therein pending, by removal, entitled "Dumas *et als. vs.* De Monsignon *et als.*," "La Couture *vs.* Randall *et als.*," and "Randall *vs.* Dressler *et als.*;" by order entered on the 29th day of June, A. D. 1891, in the last-mentioned causes also pending in the said circuit court of West Virginia for the county of Kanawha; and by order duly entered on the 7th day of March, A. D. 1890, in said circuit court for Wythe county, Virginia, in said suit of "Randall's Executors *vs.* Puget *et als.*," by virtue of which appointment said Read became vested with all the estate, power and authority formerly bestowed upon and vested in said Dumas, trustee, by the act aforesaid.

By virtue of his authority as such trustee and the further authority of a decree entered on the 29th day of August, A. D. 1891, in said causes in this court, and of a decree entered on the 10th day of September, A. D. 1891, in said causes in said circuit court of Kanawha county, the said John R. Read, trustee, together with David W.
3 Armstrong, who held a contract with said trustee for the purchase of said land, conveyed said land by deed dated September 29th, 1891, to John V. Le Noyne, and the said Le Noyne and his wife, by deed dated December 27th, 1893, conveyed the same to your orator, who now owns the same; all which will more fully appear by reference to copies of said grant, orders, decrees and deed duly of record, copies whereof your orator will in due time file as part hereof marked "H. C. K. 1" to "H. C. K. 11" respectively. Said deed from Reed and Armstrong to Le Noyne, as also said grant to

ginia for said Logan county, at the July, 1883, term thereof, that a certain parcel of land on said Ben creek in said county, mentioned as 140 acres, was waste and unappropriated land of said State and subject to sale as such for the benefit of the school fund of said State and to procure an order of said court for the sale thereof, at which sale, made October 2nd, 1883, under said order, the said Hatfield became the pretended purchaser of said land at about the costs of proceedings for such sale, and on or about the 14th day of March, 1889, procured said commissioner of school lands to execute to him an instrument of writing purporting to convey to said Joseph Hatfield the said 140 acres of land, which instrument the said Joseph procured to be recorded on the 12th day of August, 1889, in the deed records of said county, in the office of the clerk of the county court, in Book "N," at page 639.

That for the like purpose and by like conspiracy with said commissioner of school lands the said Joseph Hatfield procured said commissioner, at the April, 1887, term of said Logan circuit
10 court, to report a certain other tract of 48 acres as waste and unappropriated land and to procure an order for sale thereof and to sell the same to said Joseph Hatfield at the July, 1888, term of said court and to execute to said Joseph on the 24th day of August, 1888, a pretended deed therefor, which the said Joseph caused to be recorded in said county clerk's office on the 31st day of August, 1888, in Deed Book "K," at page 409.

That prior to the last-mentioned transaction said Joseph Hatfield presented to said Logan circuit court a petition stating that he had purchased from the commissioner of school lands of said county a tract of 72 acres of land on said Ben creek, and praying that said commissioner be authorized to execute to said Joseph a deed therefor, which was accordingly done and said deed executed on the 10th day of November, 1884, and the said Joseph caused the same to be recorded in the said deed records, in Book "I," at page 464. Copies of said deed, marked "Hatfield No. 3, No. 4, and No. 5," respectively, will be filed herewith.

That all the proceedings by said commissioner of school lands were purely *ex parte* and non-judicial and without notice to your orator's predecessor in title, the then owner of said Morris grant, and at the time said tracts of land were reported and sold and said deed executed by said commissioner of school lands the said lands were not waste and unappropriated nor forfeited nor for any other cause subject to sale in any manner or for any purpose whatever by said commissioner of school lands nor by or on behalf of the State of West Virginia, as both said commissioner and said Hatfield well knew, and said proceedings were wholly without authority of law and were
coram non judice and void and gave to said commissioner no
11 right or authority to make sale of said land or to execute said deeds therefor, and the same are fraudulent, null, and void, but said deeds and proceedings, being in form of law and being regular upon their faces, appear to convey title to the land therein described, and the invalidity of said deed can only be made to appear by evidence *aliunde*.

That after the procuring of said fraudulent and pretended deeds, as aforesaid, to wit, about the year 1891, the said Joseph Hatfield died intestate, leaving as his only heirs-at-law the defendants above named, who thereupon set up claim of title to the land embraced in said pretended grants and deeds and now wrongfully claim title thereto, and such claims and the said pretended grants and deeds cast a cloud upon your orator's title to his said land and hinder and embarrass him in the free use, enjoyment, and disposal thereof.

That the existing constitution of West Virginia, adopted in the year 1872, provides that it shall be the duty of every owner or claimant of land to have it entered on the land books of the county in which it or a part of it is situated and to cause himself to be charged with the taxes thereon and pay the same, and further provides that when for any five successive years after the year 1869 the owner of any tract of land containing one thousand acres or more shall not have been charged on such land books with State tax on said land, then, by operation of such provision, the land shall be forfeited and the title thereto vest in the said State, but neither said constitution nor any statute of said State before or since the adoption of said constitution has made any provision or given any direction whereby or how the said duty may be discharged by such land-owner; but, on the contrary, the legislature of said State, by laws enacted before said constitution was adopted and subsequently re-enacted, has made complete provision for the entering and charging of all lands subject to taxation by the public officers, without reference to and in spite of the
12 owner thereof, and has provided that when lands have been sold to the State for unpaid taxes they shall not be again entered upon the land books unless and until the said lands are redeemed, when it is by law distinctly the duty of the public officers of the State to enter and charge such lands independently of any action by the owner thereof, and your orator is advised that said provision of said constitution requiring the land-owner to have his land entered for taxation has never been made operative, and your orator is further advised that it was not the purpose of said provision to apply to, and that it could not apply to, any land that at the time said constitution was adopted was already on or had been entered upon the land books, for the then existing statutes provided for the regular charging of land by the county officers, year by year, when once the said land was entered on the land books or brought to their notice, and your orator's said land had been entered upon the said land books long before the adoption of said constitution, to wit, in the year 1869, and was on said land books charged with taxes in the names of your orator's predecessors in title when and after said constitution of 1872 was adopted, and said land was not within the purview of said provision, as your orator is advised, whether the same was operative or not.

That after the sale of said land for taxes, as aforesaid, it could not lawfully be entered upon the land books and charged with taxes until after the redemption thereof, and the said redemption decree of 1883, procured by said Randall, trustee, your orator's predecessor in title, contained and made all the provision for the restoration of

said land to the land books that was necessary to cause the said land to be charged with taxes, if the officers of said State had discharged their duty under the law and under said decree, and the said Randall did all that could reasonably have been required of him, or that, in the absence of specific statutory direction, he could
13 have supposed needful for him to do to cause said land to be charged with taxes, if any duty was incumbent upon him in the matter; but, as aforesaid, said land was not entered upon the land books nor charged with State taxes by the officers who alone had the power and authority to enter and charge said land.

That said constitution, section 3, article 13, further provides that the title to lands forfeited to said State for non-assessment of taxes, as aforesaid, "shall be and is" by said constitution transferred to and vested in any person (among others mentioned) for so much of said land as such person shall have title or claim to, regularly derived mediately or immediately from or under a grant of the Commonwealth of Virginia or of the State of West Virginia, not forfeited, which but for the title forfeited would be valid, and who or those under whom he claims has or shall have paid all State taxes charged or chargeable thereon for five successive years after the year 1865 or from the date of the grant, if it shall have issued since that year; and the defendants claim that the title of your orator's predecessor in estate to said Morris grant was forfeited in the year 1888 by reason of said non-assessment of taxes thereon after 1883, and by operation of said constitution that the said pretended grants of 330 and 450 acres of land, upon which they or the said Joseph Hatfield have paid all State taxes since the year 1865, could, but for said Morris grant, be valid, and that by operation and virtue of the provision last mentioned of said constitution the title vested, by such forfeiture, in defendants to the extent of the said grants claimed by them. But your orator is advised and claims that the said provisions of said constitution purporting by its own operation, irredeemably and without judicial proceedings, to forfeit lands for non-assessment of State taxes for five successive years and to vest such forfeited title in strangers
14 thereto are in contravention of the Constitution of the United States, and are therefore null and void, and that your orator's land never was forfeited thereby, and the title thereto could not and did not vest in defendants to any extent or in any manner, and that whether said provision be void or for any reason valid it is not the true meaning and intention of said constitution to vest in other persons title to any land, forfeited or otherwise, to which the title was not in the State at the time of the adoption of said constitution, and, so far as said constitution purports or attempts, if it does, to transfer to or to vest in any person other than the former owner the title to any land thereafter to become forfeited for non-assessment, your orator is advised and claims that said constitution is in contravention of the Constitution of the United States and is null and void.

That your orator is advised that it may be urged that it has recently been held by the Supreme Court of the United States in the

case of King *vs.* Mullins that the forfeiture of land by the constitution of the State of West Virginia is valid, and that such decision is binding and conclusive upon your orator and upon this court; but your orator is advised and asserts that said Supreme Court held such forfeiture to be valid only by virtue of the statutes of said State and the suits and judicial proceedings by the State thereunder, wherein and whereby the person whose lands are forfeited may redeem the same by payment of the taxes that should have been charged thereon and because of such right of redemption; and your orator shows that by the terms of those statutes no right is given, and no proceeding is afforded, whereby there can be any redemption of lands alleged to be forfeited that are claimed adversely under the provision of section 3 of article 13 of said State constitution; but all such portions are by express terms of said statute reversed and excluded from the operation and effect of such redemption and of the
15 proceedings wherein redemption as to land not so claimed is permitted; and the defendants contend the said tracts claimed by them under said so-called grants from the Commonwealth are not subject to nor affected by the said statutes and proceedings which were relied upon by said Supreme Court to sustain said forfeiture, and said decision has no application to any of the questions arising herein concerning said land claimed by defendants, as aforesaid, and your orator claims that said statutes contravene the Constitution of the United States and of said State.

That your orator is advised that it may be objected or suggested that your orator is negligent in bringing this bill, and that he ought not, therefore, to have the aid of a court of equity in this behalf, concerning which objection your orator shows that not only ought such objection not to be entertained in this court, in which up to a short time before your orator's purchase of said land the same had been held and managed as a trust estate, but at the time of your orator's said purchase he had no knowledge or notice of such adverse claims by the defendants or of the said pretended grants and deeds, but upon discovering the said claims to said tracts and other lands of your orator, some time after his said purchase, your orator brought suit against said defendants and others, and in order to the determination of the legal controversies between your orator and these defendants, especially the question of forfeiture, there being no dispute of fact, an agreed case was by the parties hereto submitted to and received by this court, upon briefs, by its order, at its June, 1895, term, the Honorable John J. Jackson, district judge, presiding, but by the reason of the illness of the said judge no decision of said cause was rendered before the said cause of King *vs.* Mullins came on for trial in this court, and no decision of said submitted cause has ever been rendered therein.

That your orator is without any plain, speedy, and adequate remedy at common law, because, your orator being in possession of
16 his said grant and the defendants not being in possession of the said lands claimed by them under said fraudulent instruments, your orator is advised that no action at law will lie against them; wherefore your orator, being elsewhere remediless, comes into

your honor's court of chancery, where alone such matters are cognizable and relieveable, and prays:

That this bill be received and filed, and that your orator have proper process thereon against said Hatfield and Rutherford.

That said pretended grants to said Aly Hatfield for said 330 and 450 acre tracts and said pretended deeds from the commissioner of school lands to Joseph Hatfield, under which the defendants claim, and each and every of them and the record thereof, and as well the pretended decrees of said circuit court for the said county of Logan purporting to authorize a sale and conveyance of said lands by said commissioner, be adjudged and decreed and held to be invalid, null, and void and of no effect, and that the same be cancelled, annulled, and set aside.

That the defendants and each of them be adjudged and decreed to have no right, title, interest, estate, or valid claim by reason of said pretended grants, decrees, and deeds to the lands and premises therein described or mentioned; that their and each of their said claims and pretensions to said lands be adjudged and decreed to be groundless; that your orator's title be quieted against them, and that the defendants and each of them be perpetually enjoined and restrained from asserting any title or claim to said lands under said pretended grants, decrees, and deeds and from disputing or questioning your orator's title to said lands.

That your orator have all further and fuller and more general relief proper in the premises.

And your orator will ever pray, etc.

HENRY C. KING,
By Counsel.

MAYNARD F. STILES.
E. L. BUTTRICK,
Solicitors.

17 EXHIBIT "H. C. K. No. 1."

Robert Brooke, Esq., governor of the Commonwealth of Virginia, to all — whom these presents shall come, Greeting:

Know ye, by virtue of 11 land office treasury warrants Nos. 652, 653, 654, 655, 658, 659, 643, 645, 647, 648, and issued the 28th Aug't, 1794, & No. 619, issued 18th September, 1794, there is granted by the said Commonwealth, unto Robert Morris, assignee of Wilson Cary Nicholas, a certain tract or parcel of land containing 500,000 acres by survey bearing date the 28th day of October, 1794, lying and being in the counties of Wythe and Russell, the greater part thereof in the former, on Sandy and Guyandotte rivers and the waters thereof and is bounded as followeth, to wit:

Beginning at 2 poplars and 2 chestnut trees on a branch of Guyandotte river and about 6 miles from the mouth of Little War creek, a branch of Sandy river being a corner of a survey of said Nicholas of 480,000 acres and a survey of 320,000 acres made for said Nicholas and Jacob Kenney and with a line of the latter S. 33° W. 6,720 poles

crossing a dividing ridge and down War creek to the mouth crossing Sandy river at 6 miles, crossing Panther creek at 9 miles and crossing several ridges to 4 white oaks on the northwest bank of Knox creek and thence leaving said survey W. 3,840 ps. crossing a creek and some of the branches thereof and along the spurs of the ridge dividing the waters of said creek and Peter's creek a branch of Sandy river to 3 poplars and a sugar tree by a small branch of Knox creek, thence N. 8,000 pos. crossing Knox creek at about 4 miles, Sandy river at 12 miles, the mouth of Turkey creek and up said creek and the northwest forks of the same, crossing Buffalo creek, Pigeon creek and the dividing ridge between Sandy and Guyandotte rivers and Gilberts creek twice, a branch of Guyandotte, to 3 sugar trees in a bottom of said river and about 20 poles below the mouth of Gilberts creek, thence N. 10 E. 4,450 pos. crossing Guyandotte river,
18 several small branches and some ridges to pointers, thence E. 6,620 pos. crossing Guyandotte river and several branches thereof to 3 sugar trees and a buckeye by a small branch of the same, being the northwest corner of a survey of said Nicholas of 480,000 acres, thence with the same S. 6,800 poles crossing Huffs or Cain creek to the beginning.

But it is always to be understood that the survey upon which this grant is founded includes 4,000 acres which having a preference by law to the warrants and rights upon which Robert Morris' survey is founded liberty is reserved that the said 4,000 acres shall be firm and valid and shall have the same effect and may be carried into grant or grants, and this grant shall be no bar in either law or equity to the confirmation of the title as before mentioned and reserved, with its appurtenances.

To have and to hold the said tract or parcel of land with its appurtenances, to the said Robert Morris and his heirs forever.

In witness whereof, the said Robert Brooke, Esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed at Richmond, on the 23rd day of June, in the year of our Lord one thousand 795, and of the Commonwealth the 19th.

[SEAL.] ROBERT BROOKE.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office.

Witness my hand and seal of office this 9th day of November, 1894.

W. R. GAINES, [SEAL.]
Register of the Land Office.

19 EXHIBIT "WYOMING, 1883," WITH BILL.

WEST VIRGINIA:

At a circuit court continued and held for the county of Wyoming, at the court-house thereof, on Tuesday, the 10th day of April, 1883, for the transaction of chancery business.

W. B. McCLURE, Com'r of School Lands for Wyoming County, *vs.* 500,000 ACRES OF LAND FORMERLY OWNED by A. D. Maupertuis and R. E. Randall, Trustee.	In the Matter of School Lands.

The prosecuting attorney of Wyoming county being present in court, this cause came on now to be heard upon the exceptions to reports of A. J. Lacy and W. T. Sarver, special commissioners herein, to whom this cause has been heretofore referred, and the matters arising, said exceptions being argued by counsel and considered by the court, said exceptions are sustained; and thereupon the Pittsburgh National Bank of Commerce tendered the court the following additional evidence of title, to wit, Exhibit No. 25, being a copy of mutilated decree, and Exhibit No. 26, being a certificate from the clerk of the circuit court of Logan county, and Exhibit 27, also a certificate of same, and the Pittsburg National Bank of Commerce having not shown that notice of filing the same nor any copy of same have been delivered to the other parties in this cause or their attorneys, as required by the decree entered herein at the last term, said Pittsburgh National Bank of Commerce not having shown that any of said papers marked Exs. 25, 26, and 27 were filed within 60 days from the date of said last-mentioned decree, as by said decree was required, the defendant R. E. Randall, trustee, objects and excepts to the filing of either of said papers marked Exs. 26, 7, 8, as aforesaid; which objection and exceptions, being considered by the court, are overruled, and the same are filed accordingly, and now this cause came on to be heard upon the report and supplemented report and petition filed herein and exhibits
20 therewith, upon the amended petition of R. E. Randall in the nature of an answer to the petition of the Pittsburgh National Bank of Commerce, upon the petition of the Pittsburgh National Bank of Commerce and the exhibits filed with each of said petitions, and upon the other papers and evidence in this cause, and was argued by counsel, upon consideration of all which the court is of opinion that at the time of the forfeiture of the land mentioned in this cause, or any part thereof, to the State for the non-payment of taxes or the failure to have the same placed upon the land books, or any part thereof, and at the time the title thereto or to any part thereof vested in the State for any of said causes, Robert E. Randall, trustee of the Swan estate, had the title thereto, superior to all other claimants and now has the right, either as creditor of A. D. Mauper-

tuis or those claiming under him or as owner of the same or of a portion of said tract and as owner of the whole or part thereof and as a creditor of A. D. Maupertuis, having a lien thereon, to redeem and pay the taxes upon the whole of said tract of 500,000 acres originally granted to Robert Morris, assignee of Wilson Cary Nicholas, on the 23rd day of June, 1795, and that the title of said Randall, trustee as aforesaid, at the time of said forfeiture was superior to that of the Pittsburg National Bank of Commerce or any other claimant of said land; and it being agreed and admitted in open court that the whole amount of taxes, costs, and interest due upon said tract is $8,000.00, and the commissioner of school lands, aforesaid, agreeing to and accepting that amount in payment in full of all taxes, costs, interest, and damages up to and including the year 1883, and it further appearing that said Robert E. Randall, trustee as aforesaid, has paid to the plaintiff this day in open court all taxes, damages, costs, and interest heretofore unpaid thereon and amounting to the sum of $8,000.00, it is therefore adjudged, ordered, and decreed that the payment aforesaid operates as a release and exoneration of all former taxes on said land, and that no sale thereof shall be made. It
21 is further ordered that the plaintiff pay said sum of $8,000 into the treasury of the State, less ten per cent. commission thereon, which is hereby allowed him, after paying the costs of this proceeding, and that he may report thereof, as required by law.

But nothing in said decree shall in anywise affect or impair the rights of the junior claimants or occupants within the boundaries of said tract of land whose titles or claims are protected by the constitution and laws of this State, and it is ordered that the clerk of this court certify a copy of this order to the auditor, and also certify, under the direction of said Randall or his attorney, a copy of this order to the assessor of the proper assessment districts for taxation.

And the Pittsburg National Bank of Commerce gives notice of its intention to appeal from this judgment of the court.

NOTE.—On margin of record is the following: "Certified to the auditor June 16, 1883."

A copy.

Attest: E. M. SEXTER, *Clerk.*

EXHIBIT "WYOMING, 1897," WITH BILL.

Decree.

WEST VIRGINIA:

At a circuit court continued and held for the county of Wyoming, at the court-house thereof, on Thursday, the 30th day of September, 1897, for the transaction of chancery business.

Present: The Hon. Joseph M. Sanders, judge.

STATE OF WEST VIRGINIA
vs.
HENRY C. KING, ROBERT E. RANDALL, Trustee; John R. Reed, Trustee; Hamilton B. Bradshaw, Trustee; John Le Moyne, Trustee; Wm. H. Gardner, Trustee; John T. Ingraham, Trustee; Pittsburg Nat'l Bank of Commerce, a Foreign Corporation; The Unknown Heirs of Wm. Reed, Deceased; Ben E. Green, James Maybrick, Horace L. Maybrick, Caroline Van Roque, David W. Armstrong, George Collins, Adolph Van Roque, Harris T. Grome, Unknown Heirs of David B. Holbrook, Deceased; Unknown Heirs of Samuel Allison, Deceased; Jesse R. Irwin, Virginia Irwin,
22 Ethel Irwin, Clara Irwin, Alvin Irwin, Harris Hoyt, Maria E. Hoyt, C. F. Thomas, S. T. Dunham, W. C. Jones, Jesse T. Wills, Nathaniel B. Benson, and Others. } In Chancery.

This cause came on this day to be heard in open court upon the report of Commissioner D. A. Robertson, to whom this cause was heretofore referred, and upon all the pleadings, exhibits, depositions, evidence, and papers herein, and was argued by counsel, J. R. Robertson, Esq., commissioner of school lands of Wyoming county, a practicing attorney and solicitor of this court, and Col. Childres, Esq., appearing for plaintiff, and H. K Shumate, Esq., appearing for defendant Henry C. King; and it appearing to the court that due and proper service of process herein has been had according to law upon all defendants and all persons interested in this suit, and that said suit is in condition for final hearing, and defendant Henry C. King having filed his answer and petition herein, claiming ownership of the Robert Morris 500,000-acre grant mentioned in plaintiff's bill by title regularly derived from the original patentee, Robert Morris, and offering to pay any taxes that may be found due upon said land, and praying to redeem the same from the forfeiture charged in said bill should said land be adjudged to be forfeited for any cause; and it appearing to the court that said tract of land was duly redeemed from all forfeitures by the defendant The Pittsburg National Bank of Commerce in the year 1882, and by defendant Robert E. Randall, trustee, in the year 1883, they being the then owners thereof whose rights said defendant, King, now holds by regular conveyances, and who has the right superior to all other claimants to redeem the land by paying the taxes chargeable thereon, with interest, and costs of this suit, and no other person claiming or appearing to have any right to redeem the same, and the said Henry C. King having this day paid to said J. R. Robertson, commissioner of school lands of Wyoming county, as admitted by the said J. R. Robertson in open court, the sum of twenty-one hundred and
23 ninety-eight and $\frac{65}{100}$ ($2,198.65) dollars, taxes and interest, due on the portion of Morris' 500,000-acre grant situate in said State of West Virginia, and the sum of eight hundred and seventy-one

and $\frac{43}{100}$ dollars, costs of this suit, and also the sum of $20.00, attorney's fee, which total sum of three thousand and ninety and $\frac{8}{100}$ dollars ($3,090.08) is hereby fixed by the court as the amount of cost, taxes, and interest chargeable upon said land *and* up to and including the year 1897, it is therefore ordered, adjudged, and decreed and declared that the said Henry C. King has the right superior to all others to redeem said lands, so far as the record in this case shows, and that the other defendants have no right, title, or interest therein or thereto, and that that portion of said 500,000-acre tract of land granted by the Commonwealth of Virginia to Robert Morris by patent dated June 23rd, 1795, which now lies in the State of West Virginia, and so far as the title thereto is in said State, and which said tract is adjudged and decreed to be now properly described, according to a resurvey thereof made in 1895 by W. D. Sell, C. E., under orders of the circuit court of the United States for the district of West Virginia and the western district of Virginia in causes therein pending, entitled Henry C. King *vs.* Conley Blankenship *et al.*, as follows, to wit:

(Further description omitted by stipulation.—Clerk.)—is hereby by the said Henry C. King fully redeemed, and all forfeitures of said land and taxes and interest heretofore charged or chargeable thereon are hereby released and discharged; and it is ordered and decreed that no sale of said land or any part thereof be made or had on behalf of said State of West Virginia; but it is provided that this redemption shall not affect the rights that any person not party to this suit may have, if any, under the provisions of section 3, article XIII, of the constitution of the State of West Virginia, such rights and claims not being in any manner adjudged or determined hereby. The defendant Henry C. King has leave to
24 withdraw from the papers in this cause any of his title papers which he may desire to withdraw by leaving certified copies of the same with the papers of this cause.

STATE OF WEST VIRGINIA, }
County of Wyoming, } *To wit:*

I, E. M. Senter, clerk of the circuit court of said county, do certify that the above is a true copy of the decree entered in the chancery cause of the State against Henry C. King, as appears of record in my office, to wit, Chancery Order Book No. 4, page 373, &c.

Teste: E. M. SENTER, *Clerk.*

25 EXHIBIT "HATFIELD NO. 1."

Henry A. Wise, Esq., governor of the Commonwealth of Virginia, to all to whom these presents shall come, Greeting:

Know ye that in conformity with a survey made on the 20th day of January, 1858, by virtue of land office treasury warrants Nos. 2194 & 22772, there is granted by the said Commonwealth unto Aly Hatfield a certain tract or parcel of land containing three hun-

dred and thirty acres lying in Logan county on the east side of the left-hand fork of Ben creek, and bounded as follows, viz:

Beginning at a white oak on the top of the fork ridge of said creek on the line of a survey made for Warren Alderson, thence down the hill S. 80½° W. 100 poles to a beech, lower corner to a survey made for said Hatfield, thence up said fork with the line of said survey N. 37° W. 24 poles to a beech and sycamore, N. 21½° W. 50 poles to a beech, N. 37° E. 114 poles to a beech, N. 15° E. 21 poles to two beeches in the mouth of a hollow, N. 39° W. 96 poles to a maple and sugar tree at the mouth of a hollow, N. 57° W. 72 poles to a sourwood and dogwood, lower corner to a survey made for Dempsey and with one line of same due N. 82 poles to a beech, maple and hickory, N. 9° W. 166 poles to a beech and birch, lower corner to a survey made for W. M. Smith, and with same N. 33° W. 87 poles to a beech, birch and sycamore on the creek bank, N. 15½° W. 104 poles to a beech and birch, N. 15° E. 46 poles to a white oak on a hillside, thence leaving said survey and up the mountain N 80½° E 60 poles to two white oaks on the top of said fork ridge, thence down said ridge near the top S. 15½° E. 774 poles to the beginning, with appurtenances.

To have and to hold the said tract or parcel of land with its appurtenances to the said Aly Hatfield and his heirs forever.

In witness whereof the said Henry A. Wise, Esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand
26 and caused the lesser seal of the said Commonwealth to be affixed at Richmond on the first day of February, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Commonwealth the 83rd.

[SEAL.] HENRY A. WISE.

27 EXHIBIT "HATFIELD NO. 2."

Henry A. Wise, Esq., governor of the Commonwealth of Virginia, to all to whom these presents shall come, Greeting:

Know ye that in conformity with a survey made on the 20th day of June, 1857, by virtue of land office treasury warrants Nos. 22170 and 24290, there is granted by the said Commonwealth unto Aly Hatfield a certain tract or parcel of land containing four hundred and fifty acres, lying in Logan county on the left-hand fork of Ben creek, waters of the Tug fork of Sandy river, and bounded as follows, viz:

Beginning at a large beech in the mouth of the Road branch, upper corner to a survey made for William Smith, thence N. 11° W. 12 poles to a birch and white walnut, corner to a survey made for said Hatfield, thence up the hollow N. 31½° W. 22 poles to a hickory & dogwood, N. 6° W. 66 poles to a bunch of lynns on a point N. 77° W. 40 poles to a bunch of lynns S. 68° W. 56 poles to a poplar, dogwood and sugar tree, S. 15° E. 10 poles to a chestnut tree, dogwood in the head of a drain, N. 65½° W. 16 poles to a bunch of lynns N. 6½° W. 16 poles to a large black walnut, thence down the hollow N.

49° E. 56 poles to a chestnut oak on a point, N. 85° E. 84 poles to a bunch of lynns & maple near the head of said fork, thence crossing the ridge S. 81° E. 290 poles to a white oak on a hillside, upper corner to the Smith survey, thence with same S. 32½° W. 42 poles to a birch by a branch, S. 12½° E. 66 poles to a beech, S. 26° E. 63 poles to a beech, S. 8° W. 64 poles crossing a ridge to a sugar tree and gum sapling, S. 58° W. 44 poles to a beech N. 83° W. 42 poles to a beech N. 64° W. 59 poles to an ironwood, sugar tree, and beech sapling, N. 44½° W. 208 poles to a beech, S. 30° W. 14 poles to the beginning, with its appurtenances.

To have and to hold the said tract or parcel of land with its appurtenances to the said Aly Hatfield and his heirs forever.

In witness whereof the said Henry A. Wise, Esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand
28 and caused the lesser seal of the said Commonwealth to be affixed, at Richmond, on the 1st day of February, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Commonwealth the 83rd.

[SEAL.]

HENRY A. WISE.

29 EXHIBIT "HATFIELD NO. 3" WITH BILL.

Copy of Deed.

Logan county court clerk's office, Deed Book "N," page 639.

L. D. Chambers, com'r, to Joseph Hatfield. } Deed.

This deed made on the 14th day of March, A. D. 1889, between L. D. Chambers, commissioner of school lands for Logan county, grantor, and Joseph Hatfield, grantee.

Witnesseth: That whereas at a sale of school lands made by the said grantor on the 2nd day of October, 1883, at the court-house of said county on a circuit court day to the highest bidder, the said grantee became the purchaser of tract No. 239, containing 140 acres of waste and unappropriated school land on Ben creek, a branch of Sandy river, in said county for the sum of $38.00, and paid $12.68 in money down and gave bond with security for $25.32, payable 12 months after date, bearing interest from the day of sale; and at the April term, 1884, of the circuit court of said county the said sale was confirmed and a decree made and entered among the chancery orders directing a deed to be made when the whole amount of the said purchase-money should be paid, and the same having been paid, including principal and interest to date; therefore for and in consideration of the premises and in pursuance of the said sale and decree of court, the said grantor doth hereby grant and convey unto the said Joseph Hatfield and his heirs and assigns forever all the right, title, interest and claim of the State of West Virginia in and to the said tract of land by the following metes and bounds, to wit: Beginning at two beeches on the foot of the hill, corner to a survey

made for Thomas E. Browning and John R. Browning, thence up the creek with same due north 50 poles —, gum, sugar tree, two beeches and white oak on a point, N. 25 W. 64 poles crossing
30 a point to a gum and two beeches near *near* the branch thence leaving said lines and up the branch N. 52 E. 18 poles to a beech, N. 13 E. 24 poles to a poplar on a branch, N. 35 E. 64 poles to a chest. oak on top of the hill, S. 38 E. 76 poles to a large chestnut oak, S. 7 W. 28 poles to 2 chestnut oaks, S. 26 E. 40 poles to a hickory, S. 1 E. 36 poles to a hickory S. 13 W. 40 poles — lynn, S. 13 E. 36 poles to a chestnut, S. 30 W. 100 poles to a forked hickory, thence — 52 W. 84 poles to the beginning, according to the plat and certificate filed with the papers and proceedings in said court to sell and convey the said tract of land.

Witness the following signature and seal.

L. D. CHAMBERS. [SEAL.]

WEST VIRGINIA, } *To wit:*
County of Logan, }

I, S. S. Altiser, a notary public in and for the county and State aforesaid, do certify that L. D. Chambers, whose name is signed to the foregoing deed, bearing date March 14th, 1889, has this day acknowledged the same before me in my said county.

Given under my hand this 25th day of March, 1889.

S. S. ALTISER,
Notary Public.

WEST VIRGINIA:

In Logan County Court Clerk's Office.

AUGUST 12TH, 1889.

The foregoing deed, together with the certificate of acknowledgment, was this day duly admitted to record.

Teste: S. S. ALTISER, *Clerk.*

A copy.

Teste: J. CARY ALDERSON,
Deputy for S. S. Altiser, Clerk.

(Stamp.)

31 EXHIBIT "HATFIELD NO. 4," WITH BILL.

Copy of Deed.

Logan county court clerk's office, Deed Book "K," page 409.

L. D. Chambers, com'r, } Deed.
to
Joseph Hatfield. }

This deed made on the 24th day of August, A. D. 1888, between L. D. Chambers, commissioner of school lands for Logan county, West Virginia, grantor, and Joseph Hatfield, grantee.

Witnesseth: That whereas at a sale of school lands made by the

said grantor on the 3rd day of October, 1887, at the court-house of said county, on a circuit court day to the highest bidder, the said grantee became the purchaser of tract No. 388, containing 48 acres of waste and unappropriated school land on Ben creek of Sandy river in said county for the sum of $21.50, all paid in money down; and at the July term, 1888, of the circuit court of said county a decree was made and entered in the Chancery Order Book "C," page 322, confirming said sale and directing a deed to be made to the said purchaser. Therefore in consideration of the premises and in pursuance of the said sale and decree of court, the said grantor doth hereby grant and convey unto the said Joseph Hatfield and his heirs and assigns forever all the right, title and interest of the State of West Virginia in and to the said tract of land by the following metes and bounds, to wit: Beginning at 2 poplars, two sugar trees and hickory in the head of said Ben creek, corner to a 2,700-acre survey made for Warren Alderson, and with part of same S. 13 E. 124 poles to a water oak and two hickories near the top of the fork ridge of Ben creek, due west 6 poles to a large service on top of said ridge, thence up said ridge N. 51 W. 47 poles to a double chestnut oak on top of said ridge, N. 33 W. 56 poles to a chestnut oak, due north 36 poles to a double chestnut on the side of a hill, N. 24 E. 50 poles to a double chestnut, dogwood and large chestnut oak
32 in the main head of the right-hand fork of said Ben creek, N. 65 E. 20 poles to a chestnut oak, S. 40 E. 122 poles to a stake on the line of said 2,700-acre survey and with same N. 55 W. 86 poles to the beginning, according to the plat and certificate filed with the papers and proceedings in said court to sell and convey the said tract of land.

Witness the following signature and seal.

L. D. CHAMBERS. [SEAL.]

WEST VIRGINIA, *County of Logan,* } *To wit:*

I, S. S. Altizer, clerk of the county court of said county, hereby certify that L. D. Chambers, whose name is signed to the foregoing deed, bearing date on the 24th day of August, 1888, has this day acknowledged the same before me in my office, and thereupon the same is duly admitted to record.

Given under my hand this 31st day of August, 1888.

S. S. ALTIZER, *Clerk.*

A copy.
Teste:

J. CARY ALBERSON, *Deputy,*
For S. S. ALTIZER, *Clerk.*

(Stamp.)

EXHIBIT "HATFIELD NO. 5" WITH BILL.

Copy of Deed.

Logan county court clerk's office, Deed Book "I," page 464.

L. D. Chambers, com'r, to Joseph Hatfield. } Deed.

This deed made on this 10th day of November, A. D. 1884, between L. D. Chambers, commissioner of school land for Logan county, West Virginia, grantor, and Joseph Hatfield, grantee:

33 Witnesseth: That whereas heretofore, at a sale of school land made by U. S. Hinchman, late commissioner for said county, at the March term of the circuit court of said county in the year 1875, the said grantee became the purchaser of a tract of school land No. 36 containing 72 acres on Ben creek, a branch of Sandy river in said county, and on the left-hand fork of the left-hand fork of said creek for the sum of $10.00, all paid down in money, and whereas by a decree of the circuit court of said county made and entered at the October term, 1884 (see Order Book, page 225), the said grantor was required to make to the said grantee a proper and apt deed upon payment of the costs of his petition filed in said court, and the said grantee having paid the full amount of said costs. Therefore for and in consideration of the premises, the said L. D. Chambers, commissioner of school land for said —— doth hereby grant and convey unto the said Joseph Hatfield and his heirs and assigns forever all the right, title and interest of the State of West Virginia in and to the said tract of land bounded as follows, to wit: Beginning at two lynns and black walnut at the foot of the mountain where the road crosses to Beech creek, thence down the hollow N. 46½ E. 38 poles to a white oak, S. 87 E. 68 poles to a white walnut and beech on a point, S. 11½ E. 12 poles to a beech in the bottom near the mouth of the road hollow thence down the creek S. 57½ E. 52 poles to two beeches, S. 25 E. 50 poles to ironwood and poplar sapling S. 41 E. 37 poles to a beech at the mouth of said fork, thence up the same S. 41 W. 30 poles to an ironwood and lynn at the forks of said fork S. 10 E. 28 poles to a beech, S. 80 W. 18 poles to a poplar on a point, S. 35 W. 18 poles to two lynns on the right-hand fork, N. 44½ W. 176 poles to a birch on the road fork S. 57 W. 20 poles to a poplar near the branch N. 21 W. 14 poles to a maple and beech on a point N. 84 W. 24 poles to the beginning, and the said grantor will warrant specially the property hereby conveyed.

Witness the following signature and seal.

L. D. CHAMBERS. [SEAL.]

34 STATE OF WEST VIRGINIA, *Logan County,* } *To wit:*

I, J. B. Wilkinson, a notary public in and for the county and State aforesaid, do certify that L. D. Chambers, whose name is

signed to the foregoing deed, bearing date the 10th day of November, 1884, this day acknowledged the same before me in my county aforesaid.

Given under my hand this 24th day of June, 1886.

J. B. WILKINSON,
Notary Public.

In Logan county court clerk's office, June 24th, 1886.

The foregoing deed was this day duly admitted to record.

S. S. ALTIZER, *Clerk.*

A copy.
Teste:

J. CARY ALDERSON, *Deputy.*
For S. S. ALTIZER, *Clerk.*

(Stamp.)

35 *Demurrer.*

(Filed June 8th, 1899.)

Circuit Court of the United States for the District of West Virginia.

HENRY C. KING
vs.
S. D. HATFIELD ET ALS.

The defendants, not confessing any or all the matters in complainant's bill alleged, demur to said bill and for cause of demurrer show:

That it appears from said bill that the title to the land claimed by complainant was, by the constitution of West Virginia, forfeited to said State December 31, 1888, and that the title thereto vested in Joseph Hatfield, under whom these defendants claim, as to the tracts of three hundred and thirty and four hundred and fifty acres in said bill mentioned; and

That it being provided by the act of February 28th, 1893, under which the suit was brought in which complainant claims to have redeemed the land claimed by him, that the suit should be dismissed as to any lands that should appear to have been sold in any proceeding for the sale of school lands, said suit could not properly be maintained nor any decree of redemption properly entered that should affect the lands claimed by these defendants under the sales thereof to said Joseph Hatfield by the commissioner of school

36 lands, therefore complainant ought not to maintain this suit.

Wherefore these demurrants pray the judgment of the court whether they should be required to answer this bill.

S. D. HATFIELD AND
NANCY C. RUTHERFORD,
By H. C. FLESHER, *Their Attorney.*

I, H. C. Flesher, counsel for the above-named demurrants, hereby certify that the foregoing demurrer to the bill of complaint herein is, in my opinion, well founded in point of law.

H. C. FLESHER.

STATE OF WEST VIRGINIA, }
County of McDowell, } *ss*:

H. C. Flesher, counsel for the above-named defendants, being duly sworn, doth say that the foregoing demurrer is not interposed for delay.

Subscribed and sworn to before me this — day of June, 1899.

L. B. DELACKER,
Clerk C. D., W. Va.

Order Setting Down and Submitting Demurrer.

At a circuit court of the United States for the district of West Virginia, continued and held at Charleston, in said district, on the 8th day of June, 1899, the following order was made and entered of record, to wit:

37

HENRY C. KING }
vs.
S. D. HATFIELD ET AL. }

This day came the parties, by their counsel, and the defendants, by their counsel, tendered their joint demurrer to complainant's bill of complaint, and the same is by the plaintiff set down for argument, and, being argued, is submitted to the court for consideration and by the court taken under advisement.

Order Overruling Demurrer.

And at another day, to wit, on the 16th day of May, 1900, the following order was made and entered of record, to wit:

HENRY C. KING }
vs.
S. D. HATFIELD ET AL. }

This cause having heretofore been heard upon plaintiff's bill and exhibits and the demurrer of the defendants thereto and the questions arising thereon having been argued by counsel and submitted to and taken under advisement by the court, and the court, having duly considered the same and being now fully advised in the premises, is of opinion to overrule said demurrer.

It is therefore ordered that said demurrer be, and the same is hereby, overruled and the defendants are assigned to answer said bill on or before the rule day of this court next ensuing.

38 *Opinion.*

HENRY C. KING
vs.
S. D. HATFIELD ET AL.

This is a suit to set aside and remove clouds upon complainant's title to portions of a tract of land claimed by him. The case is now heard upon the bill and demurrer.

The complainant claims a tract of five hundred thousand acres of land under a grant issued to Robert Morris by the Commonwealth of Virginia June 23rd, 1795, and under mesne conveyances from the grantee to the complainant, which tract is situated partly in the State of West Virginia, in Logan, Mingo, Wyoming, and McDowell counties. He files as exhibits with his bill title papers which show a regular chain of conveyance to him, and alleges that he is in actual possession of said tract. He also files as exhibits copies of two patents, one for four hundred and fifty acres and one for three hundred and thirty acres, issued to Aly Hatfield, now deceased, by said Commonwealth in 1899, and of three deeds from the commissioner of school lands of Logan county to Joseph Hatfield, now deceased, for tracts of 72, 48, and 140 acres, respectively, executed in the years 1884, 1888, and 1889, under proceedings on behalf of the State of West Virginia for the sale of waste and unappropriated land of the State. The defendants claim these tracts by inheritance, but have had no possession of them. Upon the face of the bill it is apparent that the title to the land in dispute is in the complainant, and that the muniments of title under which the defendants claim confer upon them no right whatever, unless the complainant has lost his title thereto by forfeiture of his land for non-assessment of taxes under the provisions of the constitution of West Virginia, and by virtue of such forfeiture that title has become vested in the defendants, as the defendants claim.

39 It appears from the bill that by virtue of certain conveyances made by John Peter Dumas, who, as trustee for the creditors of James Swan's estate, was the owner of the Morris grant, and by virtue of a certain judicial sale of three-fourths thereof, the validity of which was disputed by the successors in trust of Dumas, which conveyances and sale were made before the organization of the State of West Virginia, one Louis Antoine des Verges de Maupertuis (sometimes called Mauperture), in 1872 and earlier, claimed three hundred thousand acres of said tract; Robert E. Randall, trustee, claimed two hundred thousand acres thereof and a mortgage upon said three hundred thousand acres for the unpaid purchase-money therefor, and one Anthony Lawson claimed an undivided three-fourths of the entire five hundred thousand acres under said judicial sale. This was the status of the title when the constitution of West Virginia was adopted in 1872. The complainant claims and exhibits title under all said persons.

Although not much more than three hundred thousand acres of said tract actually lies in the State of West Virginia, the rest being

in Virginia and Kentucky, the said Anthony Lawson and his grantees, James Black and Abraham Suydam, were charged upon the land books of Logan county with taxes upon the three-fourths interest or claim at three hundred and seventy-five thousand acres from 1865 to 1878, when said interest was reduced by the county court to one hundred thousand acres, after which time said interest was charged to them and to their grantee, the Pittsburg National Bank of Commerce, up to and including the year 1882, all which taxes were paid. Notwithstanding the charging and collection of such taxes, said Randall, trustee, and the heirs of said Maupertuis, then deceased, being unacquainted with the location of said land, had the whole five hundred thousand acres entered upon the land books of Wyoming county in 1869, and charged with taxes thereon, the Maupertuis interest as three hundred thousand acres, and the Randall interest as two hundred thousand acres. In 1871 said two-hundred-thousand-acre interest was sold to the State for unpaid taxes of 1870, and in 1877 the three-hundred-thousand acre interest was sold to the State for the unpaid taxes of 1874–'5, the prior taxes having been paid.

Afterwards, said land not having been redeemed within one year from the sale, as provided for by the statute, a proceeding was instituted in the circuit court for Wyoming county by the commissioner of school lands on the part of the State to sell the said five-hundred-thousand acre grant for the benefit of the school fund, whereupon the said Randall filed his petition to redeem, and the Pittsburg national bank presented a protest against such redemption, but by a decree entered therein April 10th, 1883, it was decreed that Randall, as trustee of the Swan estate and as creditor of Maupertuis, had the superior title and the right to redeem said five-hundred-thousand acre grant, and, the back taxes, interest, and costs being paid into court, the land was decreed to be thereby exonerated and released from all taxes up to and including the year 1883. The Pittsburg national bank appealed from this decree, holding the Randall title to be superior, but the appeal was dismissed upon the ground that the proceeding did not contemplate a contest and adjudication of rival claims of title. McClure *vs.* Mauperture, 29 W. Va., 633.

The decree aforesaid ordered that the clerk certify a copy thereof *the* the auditor of the State, and "also to certify, under the direction of Randall or his counsel, a copy thereof to the assessors of the proper assessment districts for taxation." The said five-hundred-thousand-acre tract was not, however, again charged upon the land books of any county of the State of West Virginia in which any part thereof is situated within the five years next succeeding the year 1883, and in 1894 the State brought another suit in said Wyoming county circuit court against the present complainant, King; the said Randall, trustee; the said Pittsburg National Bank of Commerce, and sundry others under *which* King claimed for the purpose of subjecting to sale for the benefit of the school fund so much of said five-hundred-thousand-acre grant as was then vested in the State by alleged forfeiture thereof for the non-assessment of

State taxes thereon for the five successive years after the year 1883, and the said King filed his answer and petition therein, denying that said land was forfeited, but offering to pay any taxes that ought to have been charged thereon, with interest and costs of said suit, and on September 30th, 1897, upon the payment of the taxes, interest, and costs fixed by the court therein, a decree was entered adjudging that said King had the right to redeem said land and declaring said land, so far as the title thereto was in said State, to be redeemed and all forfeitures and taxes charged or chargeable thereon to be released and discharged, said decree providing, however, in conformity with the statute under which the suit was brought, that said "redemption shall not affect the rights that any person not party to this suit may have, if any, under the provisions of sec. 3 of article 13 of the constitution of the State of West Virginia."

In 1859 Aly Hatfield procured from the officers of the Commonwealth of Virginia who were by law charged with the duty of issuing grants of the waste and unappropriated land of the Commonwealth the instruments purporting to be grants for said 450 and 330 acre tracts, and under proceedings in the circuit court of Logan county instituted by the commissioner of school lands of that county for the sale of waste and unappropriated land Joseph Hat-
42 field procured a deed from said commissioner for a tract of 72 acres of land November 10th, 1884; for 48 acres August 24th, 1888, and for 140 acres March 14th, 1889, upon a sale October 2nd, 1883. The defendants are sole heirs-at-law of Aly and Joseph Hatfield, who are now deceased.

As to these patents and deeds the complainant in his bill alleges: "That at the time said pretended grants were issued the land therein described was wholly part and parcel of said Morris grant and was owned by your orator's said predecessor in title and was not waste and unappropriated land or otherwise belonging to said Commonwealth nor within the power of the said Commonwealth or of any officer thereof to grant and dispose of, as said Aly well knew, and said instruments were and are wholly null and void, but being in due form they purport and appear upon their faces to convey title to the land therein described and can be shown to be invalid only by evidence *aliunde*.

That all proceedings by said commissioner of school lands were purely *ex parte* and non-judicial and without notice to your orator's predecessor in title, the then owner of the said Morris grant, and at the time said tracts were reported and sold and said deed executed by said commissioner of school lands the said lands were not waste and unappropriated nor forfeited, nor for any other cause subject to sale in any manner on behalf of the State of West Virginia, as both said commissioner and said Hatfield well knew, and said proceedings were wholly without authority of law and were *coram non judice* and void and gave to said commissioner no right or authority to make sale of said land or to execute said deeds therefor, and the same are fraudulent, null, and void; but said deeds and proceedings, being in form of law and being regular upon their faces, appear to

convey title to the land therein described, and the invalidity of said deeds can only be made to appear by evidence *aliunde*."

13 The complai-ant in his bill refers to sections 3 and 6 of article 13 of the State constitution; contends that the provision making it the duty of the land-owner to have his land entered on the land books has never been made operative by appropriate legislation, the duty of entering and charging lands devolving upon the public officers without the aid of the owner under a complete statutory system; that the provision has no application to land that was on the land books at the time of the adoption of the constitution, and that by the provision in the decree of redemption in 1883 Randall, complainant's predecessor in title, did all that could *be* reasonably be required of him, in the absence of statutory direction, to cause the land to be re-entered upon the land books and charged with taxes if the officers of the State had performed their statutory duty. The complainant alleges that the defendants claim that the title of complainant's predecessor in estate was forfeited in 1888 "by operation of said constitution" by reason of non-assessment of taxes, and became thereby transferred to Joseph Hatfield to the extent of said 450 and 330 acre grants, the taxes on them having been paid, but the complainant avers that he "is advised and claims that the said provision of said constitution purporting to forfeit lands for the non-assessment of State taxes for five successive years is in contravention of the Constitution of the United States, and is therefore null and void, and the title thereto could not and did not vest in defendant- to any extent or in any manner, and that whether said provision be void or for any reason valid it is not the true meaning and intention of said constitution to vest in any other persons title to any land, forfeited or otherwise, to which the title was not in the State at the time of the adoption of said constitution, and, so far as said constitution purports or attempts, if it does, to transfer to or

14 to vest in any person other than the former owner the title to any land thereafter to become forfeited for non-assessment, your orator is advised and claims that said constitution is in contravention of the Constitution of the United States and is null and void."

The foregoing being, in brief, the princip*le* matters set out in the bill bearing upon the question to be considered, the defendants interposed their demurrer on the ground "that it appears from said bill that the title to the land claimed by complainant was by the constitution of West Virginia forfeited to said State December 31st, 1888, and that the title thereto vested in Joseph Hatfield, under whom these defendants claim, as to the tracts of 330 and 450 acres in said bill mentioned, and that it being provided by the act of February 23rd, 1893, under which the suit was brought, in which complainant claims to have redeemed the land claimed by him, that the suit should be dismissed as to any lands that should appear to have been sold in any proceeding for the sale of school lands, said suit could not properly be maintained nor any decree of redemption properly entered that should affect the lands claimed by these de-

fendants under the sales thereof to said Joseph Hatfield by the commissioner of school lands."

So much of article 13 of the constitution of West Virginia, relied upon by the defendants, as it is material to consider is contained in sections 6 and 3, as follows:

SEC. 6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one
45 thousand acres or more, shall not have been charged on such books with State tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the State. But if, for any one or more of such five years, the owner shall have been charged with State tax on any part of the land, such part thereof shall not be forfeited for such cause.

SEC. 3. All title to lands in this State heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated to the State of Virginia, or this State, or purchased by either of said States at sales made for the non-payment of taxes and become irredeemable, or hereafter forfeited, or treated as forfeited, or escheated to this State, or purchased by it and become irredeemable, not redeemed, released or otherwise disposed of, vested and remaining in this State, shall be, and is hereby transferred to, and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees,) for so much thereof as such person has, or shall have had actual continuous possession of, under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the State taxes thereon for any five years during such possession; or if there be no such person, then to any person (other than those for whose default the same have been forfeited, or returned delinquent, their heirs or devisees,) for so much of said land as such persons shall have title or claim to, regularly derived, mediately or immediately from, or under a grant from the Commonwealth of Virginia, or this State, nor not forfeited, which but for the title forfeited would be valid, or who, or those under whom he claims has, or shall have paid all State taxes charged or chargeable thereon for five successive years after the year 1865, or from the date of the grant, if it shall — issued since that year."

* * *

46 The question that the court has now to determine is—

Whether the title that was originally vested, by valid grant, in Robert Morris and appears to have descended by regular course of record conveyances to the complainant has, in fact, been transferred, by due process of law, to the defendants to the extent of the land described in the patents and deeds acquired and claimed in hostility to the said Morris grant. The answer to this question involved not only the interpretation of the above-mentioned provisions of the constitution of West Virginia, but the question of their consistency or inconsistency with the Constitution of the United States and their consequent validity or invalidity.

It is contended on behalf of the complainant, both in the bill and in the argument of counsel, that the provisions of sec. 6 of the constitution do not apply to any land that, like complainant's, was on the land books when the constitution was adopted and have not been made operative upon any land by proper legislation and are not self-enforcing; that complainant's predecessor in title, Randall, did all that was reasonably in his power to have the land now claimed by complainant resentered and charged with taxes on the land books after the redemption thereof, in 1883, and that no forfeiture can be claimed because that was not done; that the constitution does not intend, by said sec. 3, to transfer to third persons titles forfeited after the adoption of said constitution, and that, so far as the said constitution does purport or undertake to forfeit the title to land and vest it in third persons or in the State without any judicial proceeding or without any right of redemption, to that extent it is in contravention of the Constitution of the United States. The defendants dispute these propositions.

Provisions somewhat similar to that contained in said section 6 of article 13, requiring land-owners to enter their lands on the
47 land books, are found in the statutes of Virginia in the acts of February 5th, 1810, and February 27th, 1835. It was recited in the former act "that many persons omit to enter their land upon the land books and thereby elude the payment of any revenue thereon," and provided that "if any person having title to a tract or tracts of land in this Commonwealth shall fail to enter the same on the commissioner's book of that county in which the land lies within eighteen months after the passage of this act the same shall be forfeited to the Commonwealth."

By the act of February 9th, 1814, forfeitures under the act of 1810 were released and a system provided for the entering and charging of lands with taxes by the commissioners of the revenue.

The act of 1835 recited that it was known to the General Assembly that "many large tracts lying west of the Alleghany mountains, granted before April 1st, 1831, never were or for many years last past have not been entered on the books of the commissioners of the revenue," required that "every owner or proprietor of any such tract or parcel of land" should on or before July 1st, 1836, enter or cause to be entered on said books all such lands owned by him, her, or them and have the same charged with all the taxes and damages in arrear or properly chargeable thereon and pay the same, and prescribed the penalty of forfeiture for their failure to do so. This act applied only to lands omitted prior to 1831. Lands other than those that "never were or had not for many years past" been on the books could well be found and entered by the commissioners without assistance from the owners.

An act passed April 1st, 1831, provided that no person in any suit then pending or thereafter to be brought for the recovery of land west of the Alleghany mountains against a *bona fide* claimant under a grant from the Commonwealth issued prior to the
48 passage of the act, who had had said land entered on the land book- and paid all taxes thereon, should be allowed to

give in evidence any grant from the Commonwealth in support of his, title to the demanded premises unless he should show that he, too, had had the demanded land entered upon the land books and charged with taxes and had paid all taxes chargeable thereon. The case of Taylor *vs.* Burdett, 11 Leigh., 347, arose under this act, in 1835, upon a grant dated June 16th, 1786, under which the plaintiff claimed and which was excluded by the circuit court. In reversing this ruling the court of appeals, per Judge Tucker, said in part:

"First, as to entering the land with the commissioner. This was first required by the act of 1810, and accordingly it appears that the lands were on the commissioner's books in 1811, for they are on the auditor's list as delinquent for that year. Now, if they were once on the books it would seem that this duty was fulfilled, as it was not required to be repeated every year."

The reasoning and authority of that case seem conclusive against any forfeiture of the Morris grant, so far as forfeiture is the penalty of any fault, default, or delinquency of the owner, for it appears that said tract had been entered by its owners and continued on the land books of both Wyoming and Logan counties long before, at the time of, and long after the constitution of West Virginia was adopted, and, in the language of Judge Tucker, "it would seem that that duty was fulfilled, as it was not required to be repeated every year," at least not by express terms nor by any inference warrantable when so terrible a consequence as the forfeiture of thousands of dollars' worth of property is to follow such inference. Only the most clear and cogent language or a manifest condition of affairs demanding it for public well-being would warrant
49 such a construction of the first clause of sec. 6 as would extend the duty of land-owners, beyond a primary compliance with the requirement of that clause, with a penalty of forfeiture for failure in that respect, in spite of the fact that the State has nowhere and at no time made definite provision for the discharge of such duty by the owner, but has, by a system the most elaborate and complete, provided for the entering and taxing of lands by her public officers.

The early Virginia acts were occasioned by the fact that many large tracts of land "never were or had not been for many years" entered on the land books, and consequently were not within the knowledge of the taxing officers. When they were once put on the books and went into the hands of the officers those officers could see to the taxing of them thereafter, which was a part of their official duty, and after 1835 Virginia did not require land to be entered by the owners under penalty of forfeiture.

After the erection of the State of West Virginia, and after the close of the civil war, during which court-houses were burned, land books lost, records destroyed, many land-owners killed or scattered, and the evidence of ownership of land left in such condition that the public officers could not in many instances, either from their own knowledge or from any record information, properly enter and charge all lands, it was made the duty of land-owners to have

their lands entered on the land books of the proper counties. When that was once done the land came under the control of the public officers, and so complete and specific is the provision of the law governing the subject (chap. 29 of the Code of West Virginia) existing prior to the formation of the State and ever since that a tract of land once on the land books will ever after continue on them and be charged with taxes year after year
50 so long as the officers of the State, appointed and paid for the purpose, attend to their duties. It is not in the power of the owner to prevent such charging, and nothing he can do can get the land off of the books. Only in the event of a sale to the State for unpaid taxes, in which event it ceases to be chargeable, can the land get off of the books, except solely by the fraud or negligence of some public officer. To hold, then, that the duty imposed on the land-owner by said sec. 6 is not fulfilled if at the time of its adoption or afterwards he had his land entered on the land books and charged with taxes is not required by the language of that section nor by anything to be found in the condition of things existing at its adoption or afterwards. Indeed, it seems not even to be permitted by the language: "But if for any one or more of such five years the owner shall have been charged with State tax on any part of the land, such part thereof shall not be forfeited for such cause." This applies to the whole tract as well as to "any part" of it. To what time do the words "any one or more of such five years" refer if not to any one or more of "any five successive years after the year 1869"? Is not all forfeiture under this section expressly prevented by a charging of the land for any year, at least if charged before the full five years next after 1869 expired? It is clear to my mind that if the tract or any portion of it was entered within said five years, as provided for in sec. 6, it could not — forfeited.

If the position here taken is sound, there could be no forfeiture of the land in question by the constitution as a penalty for the default of the owner. Any forfeiture for non-assessment must be independent of any act or default of the owner; but suppose the duty of the land-owner to have his land entered, etc., arises every time they get off the books for any cause, what is the situation presented by this case?
51 The Supreme Court in King *vs.* Mullins, 171 U. S., 104, a case arising upon the provision in question, answering the argument that "the land may be forfeited by reason of the land-owner not having been, in fact, charged on the land books with the taxes due from him, although he was not responsible for such neglect," said: "We do not so interpret the State constitution or the statutes enacted under it. If the land-owner has done all that is reasonably in his power to have his land entered upon the land books and to cause himself to be charged with taxes thereon, no forfeiture can arise from the owner not having been charged on such books with the State tax. The State could not acquire any title to the lands merely through the neglect of its agent having custody or control of its land books."

It cannot be denied that the owner of the Morris grant did all

that, in the language of Mr. Justice Harlan, was "reasonably in his power to have his lands entered upon the land books and to cause himself to be charged with taxes thereon." In determining what is reasonably in the power of the land-owner, and what negligence, which can occasion the State no loss whatever, should subject him to the dire consequence of losing his land, the State, through her agents, being in default, we must bear in mind that we are dealing with forfeitures, odious in law, which courts will not enforce where there is any escape; that the land-owner is without precedent, guide, or direction for the discharge of his duty, and that the requirement is *in invitum*.

It appears that the land had been purchased for the State at a sale for delinquent taxes prior to 1883, and the State, through her commissioner of school lands, had instituted proceedings in the circuit court to dispose of the land under a statute which permitted the owner or person in whose name it was sold to come in and redeem.

52 The State, the claimant, and the land were all before the court, and it was ordered by the very same decree that permitted payment to the State of the redemption money which was accepted and applied by her that the clerk of the court, a public officer charged by the statute with that duty, should certify a copy of the decree to the State auditor, and also certify copies to the county assessors for taxation, the latter under the direction of Randall or his counsel. This seems to have been all that the court, the State, and Randall supposed to be necessary to insure the re-entering of the land upon the land books. It was in effect a direction by the court as to what was necessary in the matter. As the law authorizing assessors to enter the land upon the land books had very recently been repealed and that duty required to be performed by the clerks of the county courts, and as the circuit court clerk was required by law, independently of the direction in the decree, to certify to the clerk of the county court an abstract of the decree, and of that clerk to enter the lands, this requirement of the decree that a copy be certified to the assessors was ineffectual and unimportant, and it is immaterial whether or not it was complied with. This decree having been passed by the court upon the petition of Randall, he had the right to rely upon it, and had reason to suppose that the land would go back on the land books without further action by him, and that there was nothing more that he, a non-resident trustee, need do, neither the constitution, the statute, nor anything else but the decree giving any direction or hint as to how he should proceed to have his land entered.

When the fact that the land is subject to entry and taxation upon the land books has been brought to the attention of the officers or agents of the State charged by statute with the matters of assessment and taxation, it should seem that the land-owner should not

53 suffer the forfeiture and transfer of his land to the State or to a stranger because of the negligence of such officers, yet if the State since 1883 or these defendants has or have acquired any title to the land claimed by the complainant, it has been "merely through

the neglect of the agent of the State having custody or control of its land books," but for which neglect no question of forfeiture could possibly have arisen.

I do not overlook the proceeding in the court of Wyoming county and the decree of redemption, so called, of 1897. In that suit King denied that the land was forfeited, but offered to pay any taxes that might be chargeable thereon. The decree does not adjudge that the land was forfeited, but releases it from the taxes chargeable and any forfeitures that there may have been, subject to the rights of persons, not parties, claimed under the constitution. The principle effect of the decree of September, 1897, is to eliminate the State and cut off the general defense of title outstanding in the State, which the defendants might otherwise have sought to rely upon. This is not their defense, however, except as to the tracts sold by the commissioner of school lands, as to which they say the decree was improperly entered; their contention is that the title to the land in controversy is in them and not in the complainant, or the State.

If the construction of the provisions of the State constitution under consideration and the question of what acts and facts bring lands within their operation rested ultimately with this court instead of the State supreme court, I might be content to pursue this discussion no further, but being uncertain whether that court will concur in the views I have expressed, I prefer to rest my decision of this cause also and principally upon a decision of the graver and more fundamental question presented by this record—the question of the
54 constitutional validity of those provisions; and in reaching my conclusion I am not unmindful of the respect due to the laws and authority of the State, but I am controlled by what I consider to be the spirit and meaning of the Federal Constitution. The Constitution is not the supreme law of the land if it be not given effect according to the letter and spirit in all the States alike at all times and in all circumstances, or if all or any doubts be resolved against it.

It is contended on behalf of the defendants that by reason of the fact that the tract of land now claimed by complainant was not charged with taxes upon the land books within the five years following the redemption thereof, in 1883, the title of said land, then held by Reed, trustee, under whom the complainant claims, became forfeited on the last day of the year 1888, and vested, by force and operation of the constitution, in Joseph Hatfield to the extent of said 450 and 330 acre tracts, which are not affected, and do not purport to be affected, by the decree of the Wyoming county circuit court of 1897, and that said decree should not affect the "school land" tracts, because the suit in which it was rendered should have been dismissed as to such tracts.

Concerning the lands claimed by the defendants, it is sufficient to say that the patents under which they claim, having been issued after the grant to Morris, and when the title to that grant was unquestioned and unquestionable, gave no right whatever to the land embraced in them within the Morris grant, and the proceedings in the circuit court of Logan county had before the five years after 1883

had expired were unauthorized and were *coram non judice*, and the deeds made thereunder were nullities. If, then, the defendants have title or any right to any of the land embraced in the
55 Morris grant and in said patents and deeds, they have got it solely by operation of the constitution of West Virginia.

It is claimed by counsel for the complainant that sec. 3 is not a law, but a legislative grant operating only upon land that was, at the time the constitution was adopted, subject to the disposal of the State; that the words "shall be and is hereby transferred to and vested in" are not words of law making but words of grant *in præsenti* and cannot affect land to which the State did not have title in 1872, so as to convey it to some person, perhaps not then in being, when afterwards the State should happen to acquire title and such person should come into being, and that therefore the lands claimed by the defendants do not come within the operation of that section, nor any lands within the saving clause of said decree of 1897. It cannot be denied that there is great force in this position; but as the section speaks of lands "hereafter forfeited," and as the act of February 23rd, 1893, commonly called the "school-land act" seems to provide for the redemption only of lands forfeited to West Virginia, which redemption is not to affect any lands held under said section 3, and as there could be no lands forfeited to West Virginia for non-assessment prior to the adoption of the constitution, that section would seem to have no operation upon lands forfeited by the constitution, unless construed to operate in the future, which seems to be the construction given to it by the State court, so far as can be determined from expressions found in the few cases in which it has been before it in any way.

Giving, then, to these provisions of the constitution and the school-land act the application contended for by the defendants, we have the result that by mere act of ostensible legislation, without any proceeding or action whatever, judicial or otherwise, before or afterwards, the full legal and equitable fee-simple title to land is
56 taken out of one private person without compensation and vested without consideration in another private person for his private use and benefit. This result can only be avoided by adopting a construction of the provisions of the constitution and act in question that would leave them little meaning, or by denying them legal validity so far as they apply to cases like the present. Can such a result legally obtain under the Constitution of the United States?

It was held by the Supreme Court in King *vs.* Mullins, *supra*, that this forfeiture provision of the West Virginia constitution, when considered and applied in connection with the statutes that authorize a suit to be brought by the State against the claimant of the land affected, in which all questions of title, location, and boundary, etc., can be tried, and in which the land-owner can redeem, does not deprive the land-owner of his property without due process of law, the court reserving its opinion upon the question whether the State constitution "alone considered" is consistent with the National Consti-

tution until the decision of that question should become necessary. That question is now presented.

In the Mullins case the defense was merely that the title claimed by the plaintiff was outstanding in the State, not that it had been by forfeiture vested irredeemably in the defendants. There was nothing that appeared in the record of that case to show that there was any legal obstacle to the full and effectual redemption by the plaintiff of every acre of the grant claimed by him. It had previously been held by the State court that these statutes had no application, and that no suit provided for by them could be instituted, except as to land the title to which had theretofore vested in the State in some legal way, and it would seem that the inquiry as to
57 what is due process of law should be confined to the act of deprivation by which the State had acquired the title and the land-owner had lost it, without looking to any later provision by which the person deprived may in some cases have restitution. But in cases like the present there is no refuge in the statute and the suit thereunder.

The suit of the State cannot, according to the statute, be maintained against any land to which the title is not then in the State. Sec. 6, act February 23rd, 1893, provides: "And if at any time during the pendency of any suit, it shall appear to the court that any part of any tract of land in question therein has been sold by the State in any proceeding for the sale of school lands, and the taxes regularly paid thereon since such sale, or is held by any person under sec. 3 of article 13 of the constitution of this State, the bill, as to such part, shall be dismissed, and the suit proceeded with to a final decree as to the remainder." If that fact should not appear to the court and the suit should proceed as to such land and a claimant be permitted to pay the taxes thereon and get a decree of redemption, the same act (sec. 17) provides: "But such redemption shall in nowise affect or impair any right, title or interest any other person may have in said real estate or any part thereof, by purchase from the State, or under and by virtue of sec. 3 of article 13 of the constitution of this State." This provision is found in all prior acts, and it would result, independently of this provision, that if the constitution had previously transferred the title of the claimant to another person, no proceeding that the legislature could devise could divest that other person of the title and revest it in the original owner. And since the title must be divested before it can revest, it likewise results that where it is vested by the constitution in any person the former owner of that title must have been deprived of it by the
58 constitution or by something anterior to it, and not in any measure by any proceedings subsequently had. Due process must be found, in such a case, in the operation of deprivation—in the constitution alone considered—and if, as I understand the opinion of the Supreme Court in King *vs.* Mullins, the constitution was held to be valid by reason of the support given by the judicial proceedings provided by statute and the right of redemption therein, then that provision of the constitution is inoperative where that support fails; that the right of redemption, which put the land-owner in a

position where he had no substantial right of complaint—none that he could not remove by a payment of his taxes—was the most potent consideration with the court in sustaining the validity of the constitution and statutes considered as a system, upon reasoning that does not seem to me to be wholly satisfactory, is obvious from the declaration of the court that that part of the code "which has the most direct bearing on the question" is the provision by which the former owner is permitted "to redeem such part or parts of any tract of land so forfeited or the whole thereof as he may desire" (p. 426–6), and which it deemed a "remedy whereby he could be relieved from such forfeiture" (p. 423); but, as has been seen, he cannot redeem any of his land that falls within any of the three classes mentioned in sec. 3, art. 13, as, for instance, any land upon which a claimant under a junior patent has paid five years' taxes—the situation of the lands claimed by the defendants. If we assume a case of a tract of 1,000 acres, alleged to be forfeited, which is entirely covered by a larger junior grant coming within the terms of said sec. 3, it is obvious that the claimant could never redeem a foot of it; that the court would not permit the State to file a bill that disclosed that situation; that no ju-
59 dicial enquiry or proceeding concerning it is authorized or permitted, and that any apparent redemption that might be had would be ineffectual. The whole matter would begin and end with the constitutional provisions, and that is the case with any tract to the extent of such adverse claims. To the constitution only must we then look and see if "by operation" thereof it provides that "due process of law" by which only a State may deprive any person of his property. If by that operation it furnishes no such due process, then I hold that sections 3 and 6 of art. 13 of the constitution forfeiting the title of one citizen to his land and transferring that title to another is null and void.

Both in England and America forfeitures and confiscations have always been odious, and it is therefore incumbent upon parties who claim property by virtue of a forfeiture to establish the validity of such forfeiture, consistently with the Federal Constitution, by controlling precedent or by convincing reasoning. Such precedent in support of the claims of the defendants is sought in the Virginia act of February 27th, 1835, already mentioned, and cases arising upon it which departed from the long-established rule of law that an inquest of office or some judicial proceeding or its equivalent—some public transaction subsequent to the commission of the act out of which the forfeiture arose—was necessary to the actual divestiture of the title—the completion of the forfeiture.

There are points of similarity between the act of 1835 and the provisions of the constitution of West Virginia under consideration, but the points of difference are such that that act, itself an anomaly in legislation, cannot stand as a precedent for the constitutional provisions. That act related to lands omitted prior to 1831, not
60 to all lands that were then omitted, nor to lands that had been admitted only since 1831, nor to any lands that might be omitted any time in the future, and only to land in that *terra*

incognita, the region "west of the Alleghany mountains." It was directed at a certain class of persons who had been long delinquent in the past; it did not deal with future delinquencies. It had no operation in the future, beyond the day set when the lands should be entered and the back taxes paid or the penalty of forfeiture incurred. It ceased to have force or effect after that day. It did not need to be repealed to arrest its action; it became *functus officio* by its limitation. The constitution, on the other hand, has reference not to the past but to the future; no particular day is named on which to suffer or avert the forfeiture; it does not cease to operate at a fixed date, but goes on until arrested by repeal. Whatever may be the advantage of one over the other in point of merit or legality, the act of 1835 can be regarded as a precedent only for an exactly similar act.

The cases that have construed the act of 1835, Statts *vs.* Board, 10 Gratt., 400; Wild's Lessee *vs.* Serpell, *id.*, 405; Hale *vs.* Branscum, *id.*, 418; Levassar *vs.* Washburn, 11 Grat., 572, are not applicable as authority in the present case, both because of the difference in the two measures and the conditions that existed when they were enacted, and because I fail to find any reasons assigned to support the conclusions of the court except they were enforcing the terms of the statute under which the proceedings were had. The court was content to declare simply how the act took effect and that the
61 enactment was "within the constitutional competency of the legislature." But it should be noted that the constitution of Virginia did not then contain the prohibition, found probably in the constitution of every other State, against depriving a person of property without due process of law, the provision being "that no man be deprived of liberty except by the law of the land or the judgment of his peers." The legislature of Virginia had prior to the fourteenth amendment a power over property, so far as express restraint was concerned, that no other State, so far as I am advised, has ever had.

The objection that the act of 1835 was unconstitutional as wanting in "due process" has never arisen in Virginia, and it is too late now for such a question to arise, because due process was not required by the constitution of Virginia, and because the fifth amendment to the Constitution of the United States, which provided that no citizen could be deprived of his property without due process of law, was a limitation upon the powers of the Federal Government only (Barron *vs.* Baltimore, 7 Pet., 247) and because the act of 1835 had ceased to have any operation for over thirty years before the fourteenth amendment was adopted; and while that amendment would have annulled the act by reason of its repugnance, if it had been one of continuing operation and had been then in force, it could not reach back over the intervening thirty years to nullify the effect of an act that was not, when it was passed and when it passed out of existence, in conflict with any existing constitution. So when the Supreme Court, in Morrill *vs.* Armstrong, 14 Wall., 109, gave effect to the act of 1835, "as construed by the supreme court or court of appeals of the State," it did not pass upon and had no power to

question the validity of the act for want of due process, and no such question arose.

The proposition that the West Virginia forfeiture is due process of law under the fourteenth amendment because, as it is con-
62 tended, such forfeitures were "the law of the land" in this State and in Virginia when the amendment was adopted, is shown to be unsupported when we consider that at that time West Virginia had never passed a forfeiture act, and that there was none in force in Virginia, either at that time or at the time when West Virginia was made a State, and had not been for many years, and that there never had been any of a general or continuous operation. But whatever may have been the power of any State over the life, liberty, or property of persons, under its own constitution or the rulings of its own courts, prior to the adoption of the fourteenth amendment, it was intended that thenceforth the life, liberty, and property of the citizen should be held "secure from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice." Scott *vs.* McNeal, 154 U. S., 34. It cannot be that that amendment only looked to the prohibition of new wrongs yet to be invented, and left the States free to repeat even those that had called forth that amendment. In White *vs.* Crump & Shanklin, 19 W. Va., 583 (592), it was held that "before the ratification of the fourteenth amendment to the Constitution of the United States the legislature might, if authorized by the State constitution, divest vested rights of property where such rights were not vested by contract; that since the ratifications of said amendment such vested rights of property can only be divested by a State by due process of law."

While the courts have not in general undertaken to give a comprehensive definition of "due process of law," they have, with complete concurrence, declared what is not due process of law in cases of various exertions of asserted power, which is quite as much to our present purpose.

63 It has been held that:

"Due process of law," without which the Constitution declares no person shall be deprived of life, liberty, or property, is not merely an act of the legislature. In Wynehamer *vs.* The People, 13 N. Y., 378, Comstock, J., says: "To say, as has been suggested, that 'the law of the land' or 'due process of law' may mean the very act of the legislature, which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The constitution would then mean that no person should be deprived of his property or rights unless the legislature shall pass a law to effect the wrong, and this would be throwing the restraint away." Selden, J., in the same case, says: "To give this clause (of the constitution above referred to) any value, it must be understood to mean that no person shall be deprived by any form of legislative or governmental action of either life, liberty, or property, except as the consequence of some judicial proceedings appropriately and legally conducted. It follows that a law which by its own inherent force extinguishes rights of property or compels their extinction without any legal pro-

ceeding whatever comes directly in conflict with the constitution." Baker *vs.* Kelley, 11 Minn., 480.

"It must be ascertained judicially that he has forfeited his privileges or that some one has a superior title to the land he possesses before either can be taken from him. It cannot be done by mere legislation. If the legislature can take the property of 'A' and transfer it to 'B' they can take 'A' himself and either shut him up in prison or put him to death; but none of these things can be done by mere legislation. There must be due process of law." Taylor *vs.* Porter, 4 Hill (N. Y.), 145, per Judge Bronson.

"By 'the law of the land' is meant not that arbitrary edict of any body of men—not an act of the assembly, though it may have all the outward form of the law—but due process of law, by
64 which either what one alleges to be his is adjudged not to be his or is forfeited upon conviction by his peers of some crime for which it was by law subject to forfeiture when the crime was committed. If this be not so, every restriction upon legislative authority would be a vain formula, without life or force. If an act of assembly can deprive a man of his property without trial and judgment, for even legal cause of forfeiture, it may in like manner deprive him of his life or his liberty, imprison him in a dungeon or hang him without judge or jury." Palairet's Appeal, 67 Pa., 479, per Judge Sharswood.

"Forfeiture of rights and property cannot be adjudged by legislative act, and confiscation without a judicial hearing, after due notice, would be void as not being process of law." Calhoun *vs.* Fletcher, 63 Ala., 574, quoting Cooley's Const. Lims.

"An act of the legislature is not the due process of law mentioned in the Constitution. The words, as remarked by Judge Bronson in the case last cited (Taylor *vs.* Porter), cannot mean less than a prosecution or suit, instituted and conducted according to the prescribed forms of ascertaining guilt or determining the title to property—in other words, a man cannot be legislated out of life, liberty, or property." People *vs.* Toynbee, 20 Barb., 219.

These authorities and a multitude of others to the same effect from all parts of the country are conclusive of the objection to the provisions of the State constitution under consideration. Taken together those provisions do not contemplate nor permit the intervention or aid of any judicial or other proceedings, but purport by their own operation to effect the divestiture and transfer of title. This is not due process of law. As was said by the supreme court of Virginia (Martin *vs.* Snowden, 18 Gratt., 100) of a less objectionable act,
65 "literally speaking, it is not any process at all."

It is not important at this time to enquire what is or what is not due process in proceedings for the assessment and sale of land for taxes. Due process in such cases relates to the regularity of the assessment, the levy, the notices of delinquency or proposed sale, to the sale and the report of sale, etc. It can have no application where, as in the case at bar, there is nothing to which it can apply—where the whole scheme, process, and operation of taxation is wanting and the object savors of land robbery. If the land in this case had been

taxed and sold the question of assessment, sale, and deprivation without the due process applicable to such proceedings might have arisen, but the question of forfeiture never could arise. It is not a matter of taxation. The constitution doesn't ever put it under the head of "taxation," but under the head of "land titles."

The constitution undertakes to forfeit tracts of 1,000 acres and more and not tracts of less than 1,000 acres, and it is urged that for want of just ground of such discrimination it is repugnant to the equality clause of the fourteenth amendment.

In King *vs.* Mullins the Supreme Court held that the discrimination was reasonable because of the difference in the facilities for ascertaining the extent and boundaries of large and of small tracts for purposes of assessment and taxation. The court was probably not aware that under the method of assessing lands in West Virginia, unlike that followed in most of the States, lands are not described on the land books by their boundaries, but only by the number of acres stated in the deed or grant and by the general locality. Since that decision the supreme court of appeals of West Virginia in State *vs.* Swann, 46 West Va., 128, a case in which it was urged that an act of the legislature passed subsequently to the constitution, forfeiting tracts of land less than 1,000 acres, was
66 within an implied prohibition of sec. 6, art. 13, of said constitution, said, per Judge English:

"I think not, and see no good reason why a man owning 990 acres of land who neglects to have it entered upon the land books should be protected from forfeiture when one holding 1,005 is not."

This ruling of the State court is conclusive that there is no good ground for the classification and discrimination made by the State constitution which thus comes under the prohibition of the equality clause of the amendment.

But the court asks: "What is to prevent the constitutional provision and the act from standing together?" The answer is obvious. The constitution being adopted before the act was passed, and being then in contravention of the equality clause of the fourteenth amendment, it was void and inoperative and could not stand by itself till it had the statute to stand with, even if they could have stood together if adopted contemporaneously; and the provision of the constitution being void and dead, it could not be revived or validated by subsequent action of the legislature.

But whatever aid the constitutional provision could get from a statute while in force forfeiting what the constitution spared, it can get none now, because the act of 1882, which by implication repealed the act of April 9th, 1873, forfeiting lands for non-assessment for five years "after" its passage, provides for forfeiture of tracts less than 1,000 acres for non-assessment only for five successive years "since" the 9th day of April, 1873, which expression by its terms covers the period of time from April 9th, 1873, the date of the passage of the act of 1873, to the time of the passage of the act of 1882, and no
more, so that there is now and has been since 1882 no law
67 attempting to forfeit tracts of less than 1,000 acres for non-assessment either "after" or "since" 1882, and the constitutional provision stands—or rather falls—alone.

But the most serious objection to the provisions in question is that they undertake to take the lawfully acquired property of one private person without his consent and bestow it gratuitously upon another private person for his private use and enjoyment. If these provisions are effectual, the fee-simple title to land which one instant before midnight on the last day of the year 1888 was in John R. Reed, trustee, was, without his act, knowledge, or consent, without hearing, notice, complaint, or proceedings of any kind, at one instant past midnight transferred from him and vested in Joseph Hatfield, without his knowledge or request and without any action of any other human being, but by the mere effluxion of time and the operation of the pre-existing legislative act—the constitution. One instant Hatfield owned nothing, the next he had title to 780 acres of Reed's land. Reed owed Hatfield nothing, was under no legal, moral, or other obligation to him, had done him no harm, and derived and expected no advantage in any way from him. Hatfield had asked nothing and had no right to ask or expect anything from Reed. Neither probably was aware of the existence of the other. As between them and the State, Hatfield and his predecessors had paid the State taxes on 780 acres for 28 years at the utmost. Reed's predecessors had paid the State taxes on 875,000 acres for 18 years and on 500,000 acres for more than half a century, aside from taxes remitted in 1838. No compensation was exacted from Hatfield either for Reed or for the State. No obligation or duty towards either was put upon him by reason of this donation. All things remained as they were before, except that the State had taken
68 Reed's title to certain land out of him and put it into Hat-* field. It requires neither authority nor argument to show that such a transfer cannot be a valid exercise of governmental power. The very sense of justice revolts at it. Free government could not exist where such a power existed. The courts with one voice have denied the existence of such power wherever it has been asserted.

The Supreme Court, in Holden *vs.* Hardy, 169 U. S., 366–390, says:

"Recognizing the difficulty of defining with exactness the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice and forbid that one man's property or right to property shall be taken for the benefit of another or for the benefit of the State without compensation."

It was said in Bloodgood *vs.* M. & H. R. R. Co., 18 Wend., 56: "It has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded upon fixed laws, however firm the government might be, to take the property of one individual or subject and bestow it upon another. The exercise of such a power would be incompatible with all government and would subvert the foundation principles upon which the government was organized."

The Supreme Court, in Davidson *v.* New Orleans, 96 U. S., 102, says: "It seems to us that a statute which declares in terms, and without more, that the full and complete title to a described piece

of land which is now in A shall be, and is hereby, vested in B would, if effectual, deprive A of his property without due process of law within the meaning of the constitutional provision." And the same court, in Chicago, Burlington & Quincy Railroad *v.* Chicago, 166 U. S., 266, referring to this language, says: "Such an
69 enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three co-ordinate departments and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated, not as an exertion of legislative power, but as a sentence, an act of spoliation."

In Wilkinson *v.* Leeland, 2 Pet., 657, the court, speaking by Mr. Justice Story, said: "We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of power in any State in the Union. On the contrary, it has constantly been resisted as inconsistent with first principles by every judicial tribunal in which it has been attempted to be enforced."

In Loan Association *v.* Topeka, 20 Wall., 664, it is declared: "To lay with one hand the power of the Government on the property of the citizens and with the other to bestow it upon favored individuals is none the less robbery because done under the forms of law and called taxation. This is not legislation. It is a decree under legislative forms. Nor is it taxation."

The supreme court of West Virginia, in Varner *v.* Martin 21 W. Va., 534 (548), Judge Green, on behalf of the court, says:

"It is true that there is neither in our constitution nor in the constitution of other States any express provision forbidding that private property should be taken for the private use of another or any constitutional provision forbidding the legislature to pass laws whereby the private property of one citizen may be taken and transferred to another for his private use without the consent of the owner. It was, doubtless, regarded as unnecessary to insert such a provision in the constitution or bill of rights, as the exercise of such an
70 arbitrary power *power* of transferring by legislation the property of one person to another without his consent was contrary to the fundemental principles of every republican government, and in a republican government neither the legislative, executive, nor judicial department can possess unlimited power. Such power as that of taking the private property of one and transferring it to another for his own use is not in its nature legislative, and it is only legislative power which, by the constitution, is conferred on the legislature. Such an act, if passed by the legislature, would not in its nature be a law, but would really be an act of robbery—the exercise of an arbitrary power not conferred on the legislature.

There is an entire concurrence of all the authorities in the proposition that private property cannot be taken for private use, either with or without compensation."

It has been suggested that in the present case the property transferred by a legislative act to a private person is not the property of another private person, but of the State, and that the State can do

with its property as it sees fit; that for the mere point of time without duration, where one day joined another, the title of Reed became the property of the State before it passed into Hatfield, so that the State gave its own land, not the land of another. I cannot give my assent to that proposition, for the reason that the transfer to the State would be only by "mere legislative act," not for any public purpose, but for the purpose of the gratuitous transfer to another private person for his own private uses, and without the right of redemption. It would be a taking from one person and giving to another by the State, even though it became the property of the
71 State for an instant of time. No such evasion of the Federal Constitution could be tolerated, but it appears that the title does not vest in the State at all, for by said sec. 3, if effectual, it has previously been transferred to the junior claimant. The language of the constitution is, "All title to lands in this State * * * hereafter forfeited * * * shall be and is hereby transferred to and vested in any person," etc., so that when the title becomes forfeited it is to vest not in the State, but directly in "any person," etc., if such there be, constituting the legislative transfer of A's property to B without A's consent, which the supreme court has repeatedly said never has received, and never can receive, judicial sanction under a constitutional government.

My attention has been called to sundry cases thought to militate against the views here expressed. It is unnecessary to analyze them. They arose upon wholly different states of facts from the case at bar, and properly understood are found to have no application to the present case nor to have the effect supposed. I have found no well-considered decision, nor is it hazarding too much to predict that none will ever be found, to sustain the position that there is any legal power in the Government, State, or National, to transfer by mere legislation the property of one private person without his consent to another private person for his private use for any cause whatever, or that a legislative act can become "due process of law" by the mere fact of its adoption, which are the important questions in this case.

My opinion and conclusion is that the aforesaid provisions of the constitution of West Virginia and the statutes of that State, so far as they purport or undertake to forfeit and divest the title of any person to his land and vest the same in any other private person,
72 or to vest the same in the State without provision for redemption by or on behalf of such owner of the whole or such part of said land as he may desire to redeem, or without provision for a sale thereof and the return of the proceeds to such owner, after deduction of all taxes and proper charges therefrom, are attempts by said State to deprive a person of his property without due process of law, and are prohibited by the Constitution of the United States, and that there can be no valid forfeiture where such right of redemption or receipt or proceeds is prohibited or not provided for.

It does not appear that the defendants have paid all taxes "since the sale" upon the tracts claimed by them under the commissioner of school lands, so as to bring them within sec. 6 of the school-land

act of 1893, requiring the State's bill to be dismissed as to such lands. They are therefore not withdrawn from the provision for redemption nor from the operation of complainant's decree; but if they were withdrawn, then, for the reasons above stated, there could be no valid forfeiture of complainant's title thereto, and it would still be in him. The title to the land in controversy appears from the bill to be in the complai-ant, and he appears to be entitled to the relief prayed for. The demurrer will be overruled, with leave to the defendants to answer.

J. J. JACKSON, *Judge.*

73 *Defendants' Waiver of Answer.*

(Filed —— —, 1900.)

HENRY C. KING
vs.
S. D. HATFIELD ET AL. } In Chancery.

Now come the defendants in this cause, by their counsel, and waive time to answer plaintiff's bill of complaint, as permitted by the order herein overruling these defendants' demurrer to said bill, and decline to make other answer unto said bill, and elect to stand upon their said demurrer.

S. D. HATFIELD,
NANCY C. RUTHERFORD,
By HENRY C. FLESHER,
Their Counsel.

74 *Final Decree.*

And at another day, to wit, on the 2nd day of June, 1900, the following decree was made and entered of record, to wit:

HENRY C. KING
vs.
S. D. HATFIELD ET AL. } In Chancery.

This day came again the parties in open court, by their respective counsel, and the defendants, by written waiver filed herein, declined to make answer to complainant's bill; and thereupon this cause came on to be heard upon complainant's bill, taken for confessed, and upon the exhibits filed therewith and upon said waiver, and was argued by counsel for complainant; whereupon, upon consideration whereof, the court, being of opinion that the patents and deeds hereinafter mentioned cast clouds upon the title of the complainant, and that the complainant is entitled to the relief prayed for, doth order, adjudge, and decree that the instruments dated February 1st, 1859, recorded in the office of the auditor of West Virginia in Grant Book No. 1 of Logan county grants, at pages 460 and 463, purporting to be patents or grants of 450 and 330 acres of land, respectively, from the Commonwealth of Virginia to Aly Hatfield, and the instruments purporting to be deeds from L. D. Chambers,

commissioner of school lands of Logan county, to Joseph Hatfield, bearing date November 10th, 1884, recorded in Deed Book I, at page 464, of the deed records of said county, for 72 acres; August 14th, 1888, recorded in Book K, at page 409, of said deed records, for 48 acres, and March 14th, 1889, in Book N, at page 639, of said deed records, for 140 acres, be, and each of them and the record thereof is, hereby cancelled, annulled, set aside, and held for naught; that the complainant's title and possession be, and it is hereby, quieted against the claims and pretentions of the defendants under
75 said instruments; that the defendants be, and they are hereby, perpetually inhibited and enjoined from asserting title under said instruments against the complainant, and that complainant recover his costs herein.

And at another day the following order was made and entered:

Order Allowing Appeal.

HENRY C. KING
vs. } In Chancery.
S. D. HATFIELD and NANCY C. RUTHERFORD.

This day came the defendants, by their counsel, and presented their petition for an appeal to the Supreme Court from the final decree entered herein on the 2nd day of June, 1900, annulling certain patents and deeds under which the said defendants claim, and from the order made on the 16th day of May, 1900, overruling the demurrer of said defendants to complainant's bill, which petition contains an assignment of errors alleged by said defendants to have been committed by the court in said cause.

And it appearing to the court that this cause is a case involving the construction or application of the Constitution of the United States, and in which it is claimed that the constitution or law of a State is in contravention of the Constitution of the United States, and the said defendants having tendered good and sufficient bond upon said appeal, conditioned according to law—

It is ordered that said petition be filed and said bond approved; that an appeal be, and the same is hereby, allowed as prayed for, and that a transcript of the record and proceedings in said cause be transmitted to said Supreme Court, at Washington, D. C., and that citation to complainant issue herein.

Endorsed:
Entered.

JACKSON, *Judge.*

December 1st, 1900.

76 *Petition for Appeal and Assignment of Errors.*

In the Circuit Court of the United States for the District of West Virginia.

HENRY C. KING
vs.
S. D. HATFIELD and NANCY C. RUTHERFORD.

To the honorable judges of said court:

The defendants in the above-entitled cause feeling themselves aggrieved by a final decree rendered and entered against them herein on the 2nd day of June, 1900, cancelling and setting aside certain patents and deeds under which they claim, and prohibiting defendants from asserting title thereunder, as also by the order entered herein on the 16th day of May, 1900, overruling their demurrer to the complainant's bill of complaint, humbly petition and show unto your honors:

That the said decree and order are erroneous and against the just rights of your petitioners, the said defendants, and that this honorable court erred therein, to the prejudice of your petitioners, in the respects specified in your petitioners' following

Assignment of Errors.

First. The court erred in overruling these defendants' demurrer to the complainant's bill, because it appears from said bill that the tract of land claimed by complainant had, without legal justification or excuse, been omitted from the land books of the counties where the same was situated and had not been charged thereon with
77 State taxes for five successive years preceding the expiration of the last day of December, 1888, and by consequence thereof the title to said land was by the force and operation of the constitution of West Virginia forfeited and divested out of complainant's grantor and transferred to and vested in Joseph Hatfield, under whom these defendants claim, to the extent of 330 acres and 450 acres then claimed by said Joseph Hatfield and mentioned in said patents, and the title so forfeited and transferred to and vested in said Joseph —— descended to and is now vested in these defendants, and was not restored to complainant by his alleged redemption, not being subject to redemption, and was not in any manner affected thereby or by the proceedings in which the same was had. The other lands claimed by these defendants having been "sold by the State in a proceeding for the sale of school lands," to wit, in a sale of same as waste and unappropriated land, they likewise were not within the operation of complainant's redemption.

Second. The court erred in construing the provisions of said State constitution, viz., secs. 3 and 6 of article XIII, relied upon by these defendants to be in contravention of the Constitution of the United States and to be void and inoperative, and in decreeing the

annulment of the said patents and deeds under which defendants claim, and sustaining complainant's title to the lands therein described, and holding that the title thereof is not vested in these defendants, and enjoining these defendants from asserting title thereto against the complainant.

And your petitioners further show:

That this cause is a case that involves the construction or application of the Constitution of the United States, and is a case in which the constitution or law of a State, to wit, the constitution or law of West Virginia, is claimed to be in contravention of the Constitution of the United States.

78 Wherefore your petitioners pray that an appeal to the Supreme Court of the United States be allowed and granted unto your petitioners; that a transcript of the record of said cause and proceedings be transmitted to said Supreme Court, at Washington, D. C., and that the said decree of June 2nd, 1900, and also the decree of May 16th, 1900, be by said Supreme Court reviewed and reversed.

And your petitioners herewith tender good and sufficient bond upon this appeal.

And your petitioners will ever pray, etc.

S. D. HATFIELD,
NANCY C. RUTHERFORD,
By Counsel.

HENRY C. FLESHER,
Solicitor and Counsel for Petitioners.

Appeal Bond.

Know all men by these presents that we, W. G. W. Iaeger, of the State of New York, as principal, and W. S. Hanna, of West Virginia, as surety, are held and firmly bound unto Henry C. King, of the city of New York, in the full and just sum of three hundred dollars, to be paid to the said Henry C. King, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of December, in the year of our Lord one thousand and nine hundred.

Whereas lately, at a circuit court of the United States for the district of West Virginia, at Charleston, in said district, in a suit depending in said court between Henry C. King against S. D.
79 Hatfield and others, a decree was rendered against the said S. D. Hatfield and Nancy C. Rutherford, and the said S. D. Hatfield and Nancy C. Rutherford having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Henry C. King, citing and admonishing him to be and appear at a United States Supreme Court, to be holden at Washington, D. C., on the 31st day of December, 1900:

Now, the condition of the above obligation is such that if the said

S. D. Hatfield and Nancy C. Rutherford shall prosecute said appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. G. W. IAEGER. [SEAL.]
W. S. HANNA. [SEAL.]

Sealed and delivered in presence of—
Witness:
C. L. DIXON.

Approved by—
J. J. JACKSON,
U. S. D. Judge, D. W. Va.

Dec. 1st, 1900.

80 *Stipulation Concerning Transcript.*

HENRY C. KING
vs.
S. D. HATFIELD ET AL. } In Chancery.

It is agreed by the undersigned, counsel for the respective parties, that there may be omitted from the transcript of the record of this cause upon appeal to the Supreme Court the exhibits mentioned in plaintiff's bill, except the grant to Morris and the decrees marked "Wyoming, 1883," and "Wyoming, 1897," and there may be omitted from the latter decree and from the bill the description by metes and bounds of the said Morris grant, it being agreed that said exhibits show a regular chain of conveyance from said Morris to plaintiff, and the description of said land not being material to any question involved in said cause upon said appeal.

MAYNARD F. STILES,
Counsel for Plaintiff & Appellee.
HENRY C. FLESHER,
Counsel for Defendants & Appellants.

81 United States of America to Henry C. King, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 31st day of December, 1900, pursuant to an appeal from a decree of the circuit court of the United States for the district of West Virginia in your favor passed in a certain cause in said court wherein you are complainant and S. D. Hatfield and Nancy C. Rutherford are defendants, to show cause, if any there be, why the decree rendered against the said defendants in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of December, one thousand nine hundred.

J. J. JACKSON,
United States District Judge, District of West Virginia.

CHARLESTON, W. VA., *Dec.* 11, 1900.

Service of the above citation is hereby accepted on behalf of the appellee King.

MAYNARD F. STILES, *Counsel.*

82 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
District of West Virginia, } *ss:*

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true and complete transcript of so much of the record in the chancery case of Henry C. King *vs.* S. D. Hatfield and Nancy C. Rutherford, now of record and on file in my office, as I have been required by the stipulation of counsel filed herein to make.

In testimony whereof I have hereunto set my hand and the seal of said court this 31st day of December, 1900, and in the 124th year of the Independence of the United States of America.

{Seal Circuit Court United States, District West Virginia, Parkersburg, West Va.}

L. B. DELLICKER,
Clerk Circuit Court U. S., D. W. Va.

Endorsed on cover: File No., 18,011. West Virginia C. C. U. S. Term No., 526. S. D. Hatfield and Nancy C. Rutherford, appellants, *vs.* Henry C. King. Filed January 3, 1901.

Filed Jan. 7, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 526.

S. D. HATFIELD ET ALS., APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANTS.

HENRY C. FLESHER,
Counsel for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-7-01

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 526.

S. D. HATFIELD ET ALS., APPELLANTS,

versus

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANTS.

STATEMENT.

In October, 1898, the present appellee filed his bill in the circuit court for the district of West Virginia, at Charleston, against the appellants for the purpose of removing the cloud alleged to be constituted by certain instruments held by them upon a tract of land lying in part in said district, known as the Robert Morris 500,000-acre grant, patented to Robert Morris in 1795, and now claimed by the complainant

by title derived from said Morris. The defendants demurred to the bill June 8, 1899 (22), and the court, having held the same under consideration until May 16, 1900, overruled it (23), supporting that ruling by an opinion in writing (24), and the defendants declining to answer, a decree was entered June 2, 1900 (44), annulling the instruments under which the defendants claimed, and defendants appeal.

The principal facts alleged in the bill are as follows:

The portion of the tract in West Virginia is situate in the counties of Logan, Wyoming, Mingo, and McDowell, and when the constitution of the State was adopted in 1872, and for some time prior thereto, the heirs of one Maupertuis claimed 300,000 acres of the tract; Robert E. Randall, trustee, claimed 200,000 acres thereof and a mortgage on the Maupertuis interest, and one Anthony Lawson claimed an undivided three-fourths of the whole under a judicial sale thereof, the validity of which was disputed by Randall and the Maupertuis heirs, all of said interests being now claimed by the complainant.

There are about 300,000 acres of the tract in West Virginia, the rest lying in Virginia and Kentucky, but Lawson and his grantees were charged with taxes on the land books of Logan county—with State and other taxes—on 375,000 acres of said land from 1865 to 1878, and afterwards, to 1882, on 100,000, and paid the taxes; and Randall and the heirs of Maupertuis had their respective 200,000 acres and 300,000 acres entered on the land books of Wyoming county in 1869 and charged with taxes. The 200,000-acre interest was sold to the State, in Wyoming county, in 1871 for the taxes of 1870, and in 1877 the 300,000-acre interest was sold to the State for the taxes of 1874–'75, the prior taxes having

been paid. Under the provision of law for the sale of land purchased for the State at delinquent-tax sale a proceeding was instituted by the commissioner of school lands in the circuit court of Wyoming county, and Randall filed his petition therein, and upon payment of the back taxes thereon had a decree entered April 10, 1883 (13), declaring a redemption of the tract—both the Randall and the Maupertuis interests—up to and including 1883. The decree directed the clerk of the court to certify a copy thereof to the auditor of the State, and to certify, under direction of Randall or his counsel, copies to the assessors of the proper assessment districts for taxation.

The land was not re-entered on the land books within five years next ensuing, and in 1894 another suit was brought in the same court by the State to sell the land as forfeited for non-assessment of State taxes for the five years after 1883. The present appellee, King, filed his answer therein, and upon payment of the amount of taxes, interest, and costs fixed by the court a decree was entered September 30, 1897, declaring the land to be redeemed, &c., by said King so far as the title was in the State and subject to the claims that any person might have under the constitution of the State.

The defendants claim under two junior patents issued to Aly Hatfield in 1858, and three deeds to Joseph Hatfield issued by the commissioner of school lands of Logan county upon sales made within five years after 1883 under proceedings to sell the waste and unappropriated lands of the State, and the defendants claimed, as alleged in the bill, that the complainant's title had been forfeited by the constitution of the State, by the non-assessment of said land with taxes after 1883, and had vested, by virtue of the said constitution,

in the defendants' ancestor, as to the two patents, and that so far as the school land tracts were concerned the redemption by the complainant was unauthorized. The complainant averred that the provisions of the State constitution and statutes relied upon by the defendants are void as being in contravention of the Constitution of the United States.

The defendants demurred upon the ground, in substance, that the bill showed that the title to the land claimed by the complainant was forfeited by the constitution of the State and vested in Joseph Hatfield December 31, 1888, to the extent of the two junior grants of 330 and 450 acres then claimed by him, and was not legally redeemed nor legally redeemable as to the tracts claimed by defendants under the commissioner of school lands, because under the statute the suit in which the decree of redemption was entered should have been dismissed as to those tracts.

The court in overruling the demurrer held that the land claimed by the complainant, having been on the land books of Logan and Wyoming counties at the time of the adoption of the constitutional provision declaring it to be the duty of the owner of land to have it entered on the land books of the county in which it or a part of it is situated and charged with taxes thereon, and forfeiting tracts of 1,000 acres or more when for any five successive years after 1869 such tracts are not so charged with State taxes, did not come within the purview of the forfeiture provision; that, furthermore, the said Randall did all that could reasonably be required of him after his redemption of 1883 to have the land entered on the books, and for that reason also the land could not be forfeited, and that the provisions of the constitution of the State, sections 3 and 6 of article 13, undertaking to

forfeit the title of a land-owner to his land and vest that title in an adverse claimant, or in the State, without right of redemption and without provision for sale and return of excess of proceeds over taxes, interest, and costs, are in contravention of the Constitution of the United States, and that section 6 is an unlawful discrimination against the owners of tracts of 1,000 acres.

SPECIFICATION OF ERRORS.

First. The court erred in overruling the defendants' demurrer to the complainant's bill, because it appears from said bill that the tract of land claimed by complainant had, without legal justification or excuse, been omitted from the land books of the counties where the same was situated, and had not been charged thereon with State taxes for five successive years preceding the expiration of the last day of December, 1888, and by consequence thereof the title to said land was, by the force and operation of the constitution of West Virginia, forfeited and divested out of complainant's grantor and transferred to and vested in Joseph Hatfield, under whom the defendants claim, to the extent of the 330 acres and 450 acres then claimed by said Joseph Hatfield and mentioned in said patents, and the title so forfeited and transferred to and vested in said Joseph descended to and is now vested in the defendants, and was not restored to complainant by his alleged redemption, not being subject to redemption, and was not in any manner affected thereby or by the proceedings in which the same was had. The other lands claimed by these defendants having been "sold by the State in a proceeding for the sale of school lands," to wit, in

a sale of same as waste and unappropriated land, they likewise were not within the operation of complainant's redemption.

Second. The court erred in construing the provisions of said State constitution, viz., sections 3 and 6 of article 13, relied upon by the defendants, to be in contravention of the Constitution of the United States and to be void and inoperative, and in decreeing the annulment of the said patents and deeds under which defendants claim, and sustaining complainant's title to the lands therein described, and holding that the title thereto is not vested in the defendants, and enjoining these defendants from asserting title thereto against the complainant.

ARGUMENT.

The opinion of the learned judge is elaborate and is able, as all his opinions are, and if this were a question of first impression might not be easily overcome, but in my view it is, in effect, controlled by the decision of this court in the case of King *vs.* Mullins, 171 U. S., 404.

The facts that control this case are few. Robert E. Randall, under whom the appellee claims, owned the tract of land in controversy in 1883. It was redeemed by him that year from previous tax sale under which the title had vested in the State. It was his duty, under section 6, article 13, of the constitution of West Virginia, to have the land entered upon the land books of some county in which a part of it was situated. It is conceded by the bill that this was not done by him, nor by his successor in trust, Reed, within five years after the said redemption. This fact resulted in the

land being forfeited to the State at the expiration of that five years, unless there is some justification for his failure to enter the land, or that section does not apply to the land, or is invalid.

THE OMISSION NOT EXCUSABLE.

It is true that it was the duty of the various officers of the State referred to by the court in its opinion to enter the land upon the land books after the redemption, and that the statutes of the State themselves furnish adequate means, if complied with by the officers, of insuring and effecting a return of the land to the land books; but I do not concede that this provision in any way relieves the land-owner of the duty laid upon him by the constitution, unless he has made some affirmative attempt to have the land entered. I will not contend that he should go to the extent of resorting to mandamus, and it is even doubtful if such an action, which has in view a preventing of the State from acquiring title by forfeiture, could be maintained, under the provisions of the constitution of the State which prohibit the State from being made a defendant in any court; but it was within the power of Randall or his successor, within the five years, to call the attention of the clerk to the fact that the land was not entered, and it does not appear that anything of that sort was done by him.

CONSTITUTION NOT CONFINED TO LAND THEN OMITTED.

All of section 6 of article 13 seems to me to relate to the future and not to the then present, including the provision making it the duty of land-owners to have their land entered upon the land books. It is true that no specific direc-

tion is given by the constitution nor by any existing statute, nor does that seem to be needful. The land-owner is presumed to know what is the method of entering and charging lands and who are the officers entrusted with that duty, and the purpose of the constitution seems to be to require the land-owner not only to aid them in that respect by the knowledge that he, better than any one else, possesses with regard to his land, but to see to it that their duty is discharged as to the entering of his land upon the land books. We are not concerned either with the justice or necessity of this provision; it is sufficient if the law distinctly makes the requirement; and I am unable to read section 6 so as to get therefrom any meaning which justifies the construction placed upon it by the learned judge, to the effect that it only applies to land that is not on the land books at the time the constitution was adopted. It seems to me that that duty applies to all land-owners during all the time the constitution is in force.

THE VALIDITY OF THE FORFEITURE LAW.

This case comes before this court upon a somewhat different state of facts from the case of King *vs.* Mullins, but not, as it seems to me, under any different state of law. There has been no change in the law in the meantime, and the decree of redemption which the appellee procured from the circuit court of Wyoming county in 1897, which was after the action of ejectment against Mullins, does not, in my understanding, change his situation with regard to the land claimed by these appellants from what it would be if no such decree had been entered, for the decree contains a res-

ervation, and so does the law under which it was permitted, that saves the lands of these defendants from its operation.

This court, in King *vs.* Mullins, held that the constitution and statutes authorizing a judicial proceeding for the sale of school land making the former owner a party constituted due process of law, and that ruling has not been reversed nor retracted, and determined, as it seems to me, the whole controversy in this case against the appellee, for I am unable to see how it could be due process of law against the owner as to a part of the tract without being such as to the whole. He was deprived of the whole tract under his entire title at the same time he was deprived of any part, and the court did not hold the constitution and judicial proceedings constituted due process of law by reason of any particular result therefrom, but because it furnished an opportunity for the land-owner to be heard and to make such defense as the law and the facts permitted. I assume that this court, in reaching the conclusions it did, did not overlook the fact that the judicial proceeding authorized provided for the dismissal of the bill as to lands of the character of those claimed by these appellants without prosecuting any inquiry beyond the fact that the adverse claimant had paid the taxes for the requisite five years under junior patent, or that they had been sold in some proceeding for sale of school lands, and that such lands were not properly subject to redemption. These appellants were not parties to the suit of the State *vs.* King nor affected by the terms of the decree.

If the land of the appellee could be vested in the State by the operation of the constitution, there would seem to be no reason why the State should not limit the terms upon which it could be recovered, so as to except from such recovery such portions as the State may see fit to withhold; and if that be the case, it would seem to be immaterial whether such portions should remain vested in the State or should be transferred to some other person; they would not be more lost to the former owner in the one case than in the other. Process of law does not fail to be due process of law because the result happens to be unsatisfactory to some person. Upon this subject it is stated in Missouri Pacific R. R. *vs.* Humes, 115 U. S., 519:

"But, from the number of instances in which these words were invoked to set aside the legislation of the States, there is abundant evidence, as observed by Mr. Justice Miller, in the case referred to, 'that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment.' It seems, as he states, to be looked upon 'as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.'"

This whole question is settled, as I conceive, in King *vs.* Mullins, *supra*. I will call the attention of the court to the cases therein cited, and respectfully submit that upon the authority of King *vs.* Mullins, *ubi supra*, the decree in this case should be reversed.

HENRY C. FLESHER,
Counsel for Appellants.

Brf. of Stiles for Appellee

Filed Jan. 7, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 526.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLEE.

MAYNARD F. STILES,
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STATEMENT OF THE CASE.

This is an appeal from a decree of the circuit court annulling certain instruments of writing under which the defendants claimed and which the complainant alleged were a cloud upon his title to the tract of land claimed by him, being the Robert Morris 500,000-acre grant, so called, made by the Commonwealth of Virginia in 1795 and now being in part in West Virginia.

The suit was brought in October, 1898 (p. 1 of Record). The defendants demurred (22), the demurrer was overruled (23), and decree for complainant entered (44), and defendants appeal.

The trial judge filed an opinion (24), to which this court is referred for a full statement of the case.

ARGUMENT.

The argument of the learned and able district judge is so full and his reasoning so conclusive that there seems little room for further debate of the questions considered. I shall attempt little more in support of the opinion than to refer more specifically to some of the provisions of law that sustain the conclusions of the court.

It may appear to the court upon first impression that the questions of law decided by the circuit court and now presented for review were decided and disposed of in King *vs.* Mullins, 171 U. S., 404, but it is not so. It will readily be seen upon examination that only one of the points discussed in the opinion of Judge Jackson was decided in that case adversely to this appellee. The opinion in this case is in entire harmony with King *vs.* Mullins. In the Mullins case, which was ejectment, the defense was not a claim of title in the defendant, but of title outstanding in the State by forfeiture under section 6, article 13, of the State constitution. It appeared only by inference, if at all, that the land claimed by the plaintiff had been on the land books of West Virginia. It did not appear, and no evidence was offered to show, that it in fact was on them at or after the adoption of the constitution, and that fact or the effect

of it was not before the circuit court in that case; nor did it appear that a complete redemption could not be had. This court, without deciding whether that section of the constitution was valid or invalid by itself, unsupplemented by judicial proceedings—whether the State could by force alone of its statute or constitution take absolutely the property of the citizen—held merely that the constitution, construed and applied in conjunction with the statute that required a judicial proceeding to be brought against the former owner, in which he might redeem the land by payment of the taxes, substantially satisfied the requirement of due process of law. The necessary inference from the opinion in that case, and the one generally accepted by the bar, is that in the opinion of this court the statutory provision for suit and the right of redemption or receipt of the excess proceeds of a sale of the land alone saved the provision of the constitution from being held to be not due process. The present record presents a far different situation from the Mullins case. The constitution is to be considered and construed alone, as it operates alone. Resort has been had to the statutes and judicial proceedings, and they have been exhausted so far as the land in dispute is concerned, without effect, the appellants say, upon the claim of title of either party. They contend that, at least as to the tracts of 450 and 330 acres, the title claimed by the appellee was forfeited away from Reed, appellee's grantor, and vested in their ancestor at the expiration of the year 1888. If the title to the land has been forfeited at all, it was at that time, because Reed was deprived of his property the same moment that Hatfield acquired it and by the same act or operation,

and if Hatfield acquired it, it was at that time; and, as that was long before the suit of the State and before the passage of the act under which it was brought, neither of them could have had any connection with the constitution in depriving Reed of his title, nor any instrumentality in the deprivation. The deprivation, if any there was, was by the constitution, unaided and alone, with even the right of redemption of the land claimed by the appellants by subsequent proceedings denied.

This is the situation that this court evidently foresaw might arise, calling for a decision whether the attempt of the constitution of the State, by its unaided operation, to divest absolutely and irrevocably the property of the citizen, and to transfer it to and vest it in another or in the State, is the exercise of a power lawfully belonging to a State under the National Constitution; and this is the situation that the learned district judge discloses and disposes of, as it seems to me, with irrefragable logic and irresistible force.

Before addressing himself to the main constitutional question the learned judge shows that there could be no forfeiture of appellee's land independently of the invalidity to the forfeiture provision, because that land is not within the purview and operation of the forfeiture laws.

AS TO ENTERING LAND ON THE LAND BOOKS.

The circuit court holds that section 6 of article 13 of the State constitution, which is set out in the opinion (28), which declares it to be the duty of every owner of land to have it entered on the land books, &c., has no application to land that was actually on the land books at the time that

constitution was adopted or at any time afterwards before forfeiture. There seems to be no escape from this conclusion. If a man's land was on the land books, that was the end of the matter; there was nothing for him to do under that section. The provision was directed at lands that were not then on the books, but ought to be there, and not to lands that were already properly entered; and to persons that were delinquent in that respect, not to persons who had already done what that law sought to compel. In Taylor *vs.* Burdette, 11 Leigh, cited by the court, it was held by the Virginia court to be sufficient that the land had been entered under a former act, although that act had been repealed seventeen years before the passage of the act of 1831, providing for the exclusion of patents from evidence where the land had not been entered and the taxes paid. The act of 1810 was repealed in 1814 (Hutchinson's Land Titles, 6, 7).

Judge Jackson, following the decision of Judge Tucker, holds that when the land is once on the land books no forfeiture can result from subsequent omission, as such omission must necessarily be without the fault of the land-owner. This is readily seen to be the case when the provisions and requirements of chapter 29 of the Code are considered. A few of the more pertinent sections are the following:

SEC. 8. The land books for every county shall be hereafter made out complete by the clerk of the county court of such county. In making said land books in each year he shall be governed, as far as is proper, by the copy of the land books last made out in his county used by the assessor or assessors therein in making his or their assessments for the year, and the entries made therein by him or them, and returned to him as required by this chapter. But he shall correct errors and mistakes which he may discover in any

such land books as to the names of persons properly chargeable with taxes on any tract or lot of land entered therein, and enter and charge the same with taxes thereon to the person or persons properly chargeable therewith, whether such correction be rendered necessary by the conveyance of such tract or lot by the person last charged with taxes thereon or otherwise. He shall also correct all errors and mistakes he may find in such land books as to the distance and bearing of any tract of land from the court-house or in the local description thereof, and all clerical errors of every sort which he may find therein.

SEC. 9. The clerk of the county court, in making out the land books, shall correct any and every mistake he may discover in the original land books, and if any taxes have been omitted for a former year, he shall enter the same, with lawful interest thereon, for collection.

SEC. 14. If the owner of any tract or lot of land has derived title thereto by several conveyances from the same person, or from different persons, such tract or lot shall be entered and charged with taxes on the land books as a whole, and not in different parcels.

SEC. 15. The clerk of every circuit and municipal court shall annually in the month of April, make out lists of all judgments and decrees for the partition or recovery of lands which have been rendered by their respective courts, and have not been before reported to the proper officer, stating in such list the date of the judgment or decree in each case, the land recovered and by whom, or the land which was divided, and between whom and in what parcels.

SEC. 16. The clerk of every county court shall annually, in the same month, make out a list of all lands, if any, lying in another county absolutely devised by wills recorded in his office and not before reported to the proper officers, stating in such list the date of the will in each case, when admitted to record, the names of the devisor and devisee and a description of the land devised.

SEC. 17. Every list mentioned in the two preceding sections shall be delivered or transmitted by mail by the officer making it to the clerk of the county court of the proper county.

SEC. 18. The secretary of state shall annually, in the month of April, make out and forward to the clerk of the county court of each county an abstract of all the grants issued by the State for land lying in such county not previously reported for assessment.

SEC. 23. Real estate purchased for the State at a sale for taxes, shall not be thereafter entered in the land books, but the auditor shall keep a register thereof. But when the real estate so purchased appears by the auditor's certificate to have been redeemed, the same shall be replaced in the land book in the name of the former owner, his or her heirs or his or her grantee, and the auditor shall, in the month of April in each year, certify to the clerk of the county court a list of such lands in his county as have been so redeemed within the preceding year. When real estate is sold to an individual for taxes, the clerk shall note in the land book the number of acres sold, and to whom, but shall continue the land upon said book in the name of the former owner until the purchaser obtains a deed therefor.

SEC. 24. The land specified in the lists, copies, deeds, records, abstracts and statements mentioned in the fourteenth, fifteenth, sixteenth, eighteenth and twentieth sections of this chapter, shall be transferred in the land books to the persons who appear thereby to be the owners thereof.

SEC. 26. When the owner dies intestate, his undivided real estate may be listed to his heirs without designating any of them by name until they shall have given notice to the clerk of the county court of the division of the same, the names of the several heirs, and the parcels allotted to each; and each heir shall be liable for the whole tax assessed upon such land while it is so listed; * * * Where the owner has devised the lands or a freehold estate therein ab-

solutely, the clerk shall charge such land to the devisee. If, under the will, the land is to be sold, it shall be charged to the decedent's estate, and the assets in the hands of the personal representative shall be liable for the taxes until a sale and conveyance thereof be made.

The office of the clerk of the county court contains the record of the title to all land in the county. He makes those records and he makes the land books, and the land-book entries follow every change of title. If the owner conveys the land, when the clerk records the deed he transfers the land on the land book and charges the new owner. Until the deed is recorded the land remains charged to the grantor. When the land-owner dies the land is charged to his heirs. Every mutation in title is followed, by force of the law governing the officers of the State, by a corresponding change on the land books, without the owner's intervention and in spite of it.

When the land is sold to the State for taxes it cannot be entered on the books again until it is redeemed (sec. 23); then the auditor certifies that fact to the clerk, and the land is re-entered and charged to the then record owner. While the land is thus omitted it cannot be forfeited for non-assessment (Sayers *vs.* Burkhardt, 29 C. C. A., 137; 42 U. S. A., 742).

The circuit court is therefore well warranted in holding that when a tract of land has once been properly entered upon the land books the owner should not suffer forfeiture for subsequent non-assessment, which can only result from the negligence of the officers, unmixed with any negligence or act of the land-owner.

The land of the appellee was on the land books for double

the proper amount when the constitution was adopted (8), and when it was redeemed the decree of redemption was certified to the auditor (14), and under section 23, above quoted, it was his duty to certify the redemption to the clerk of the county court without further suggestion, and of the clerk of the circuit court under section 15 to do the same thing, and of the clerk of the county court to enter and charge the land without further suggestion.

The circuit court properly holds, upon the facts shown in this case, that the appellee's land neither was nor could be forfeited, because not being within the scope of the forfeiture provision referred to.

THE STATE CONSTITUTION CONTRAVENES THE CONSTITUTION OF THE UNITED STATES.

Section 6, article 13, of the State constitution has been a good deal discussed by lawyers, principally in connection with the "King case," not having arisen more than once before, but it has been upon an erroneous idea of its scope and meaning and apparently without a candid effort to discover its true application. A critical exposition of the matter has been made for the first time by the learned and able district judge in the present case, and the opinion as to its meaning and application arrived at by him is different from the random notion commonly current that that provision applies to any land that may at any time be off the books, and to all persons who fail to resort to legal proceedings to get it back. But, in view of the possible adoption of a different construction by the State court, which would throw open a question the final settlement of which ought

not to be delayed, the learned district judge considers the forfeiture provisions, broadly applied, as contended for by the defendants, in connection with section 3, and is led to the conclusion that they are in conflict with the National Constitution, chiefly because of the direct legislative transfer of title sought to be effected thereby.

In King *vs.* Mullins this court went no further than to hold that the "system" formed by the constitution, the statute for the sale of school land, and the judicial proceeding thereunder permitting redemption and retention or recovery of the land by the former owner, afforded due process of law. It did not intimate the opinion that any separate part of that system, standing alone, was due process. The contrary is distinctly implied.

SECTION 8, act of February 28, 1893, is:

* * * "And if at any time during the pendency of any such suit it shall appear to the court that any part of any tract of land in question therein has been sold by the State in any proceeding for the sale of school lands, and the taxes regularly paid thereon since such sale, or is held by any person under section three of article thirteen of the constitution of this State, the bill, as to such part, shall be dismissed, and the suit proceeded with to a final decree as to the remainder."

Part of the land now in controversy was claimed under said section 3 and part had been "sold" in a proceeding of which no notice was given to the owner and of which he had no knowledge—an *ex parte* application of the commissioner of school lands. The suit was not dismissed because these facts did not happen to come to the notice of the court.

Now, although the person representing the State may inadvertently bring a suit against land and the person in whose name it ought to have been charged with taxes, if that suit must be dismissed, in whole or in part, and cannot go on to final hearing when it appears that some other person claims the land, in whole or in part, under a certain hostile color of title, that suit and the statute that authorizes it, to the extent that the suit must be dismissed, can by no fair construction be any part of the process by which the land-owner is deprived of his property. The very ground of the dismissal is that he has already been deprived before the suit and without it. As said by the supreme court of Kentucky in Gaines *vs.* Buford, 1 Dana, 488:

* * * "The forfeiture was the result of nothing done in that suit. The verdict and judgment formed no condemnation upon which to base it, and from which it could follow as an incident. They were themselves but the result of a forfeiture theretofore incurred, and of a divestiture of title which had theretofore taken place. The court and jury were not a means for carrying into effect what the legislature had commanded, but acted upon what it was supposed the legislature of itself had already done. The title passed from Gaines on the 2nd of August, 1825, long before this trial, or it is still in him."

The court is without discretion and the land-owner without power or help; the suit is dismissed. "The judges sit to execute legislative judgments and decrees, not to declare the law and administer the justice of the country."—Mr. Webster in the Dartmouth College Case, 4 Wheat., 578.

The deprivation as to land that cannot be redeemed or as to which the suit must be dismissed without going into the

merits, and the transfer of title to the adverse claimant, is not by the judicial proceeding, but by prior operation of the constitution alone; and by every reason and authority that is not due process of law, as the learned district judge holds and as this court has distinctly implied and will surely hold.

This court has so often sustained the doctrine laid down by the district judge in this case that it is needless to multiply quotations; but a pertinent idea is well expressed by Chief Justice Lindsay in Marshall *vs.* McDaniel, 12 Bush. (Ky.), 378, in disposing of a similar act, thus:

"We conclude without hesitation that so much of the act of 1825 as provided that for a mere failure to list lands for taxation the title should be forfeited, and should *ipso facto*, without inquiry or trial, and without opportunity to the party supposed to be in default, even to manifest his innocence, be vested in the Commonwealth, is unconstitutional and void.

"To deny to the legislature the power to work forfeitures for the non-listing of property for taxation, by the mere inherent force of the legislative enactment, is not to question its rights to provide that without judicial proceedings it may cause property to be assessed, taxes to be levied, tax precepts to be issued, and the tax-payer's property to be seized and sold for the purpose of enforcing collections. * * *

"But when the Commonwealth, instead of thus subjecting to sale the delinquent tax-payer's property, or so much as may be necessary to raise his proportion of the public burden, undertakes to treat his delinquency as a crime, and to punish him by forfeiting his estate, the constitutional guarantee which secures to a citizen the right to be heard before his freehold shall be seized or he be condemned, and to be proceeded against in accordance with 'the law of the land,' applies, and the courts cannot, in deference to the legislative

department of the Government, hesitate to vindicate the constitutional rights of the individual."

Under the West Virginia law the owner is not given an opportunity to be heard until *after* his freehold is seized, nor even then where there is an adverse claimant under section 3.

The circuit court does not deny to the State of West Virginia the possession of all the power of taxation that is possessed by any State, or that was possessed by the Crown in England before the Revolution; but the power to take property by sheer act of legislation, *because it was not taxed*, and to bestow it upon a private person is a power that never was claimed by the English Crown (Bennett *vs.* Hunter, 18 Gratt., 100) and that cannot exist where "due process of law" is required.

Let the whole of article 13 of the constitution of the State and all kindred legislation be entirely abolished, and the taxing power of the State would not in the least be impaired or affected; for under her existing general revenue laws this State exercises as complete taxing power as any State in the Union. If, in addition to her proper and ordinary taxing power, she has the further power under the National Constitution to confiscate property when not taxed for five years or for any greater or less period, and to bestow it upon private persons, every other State and Congress has the same power, and private property is held subject to the will or caprice of legislative bodies, unprotected by the judicial power. This court has not even intimated in King *vs.* Mullins or elsewhere that such a power exists, and without it the contention of the appellants cannot be sustained. The circuit

court holds in effect that the attempted confiscation is not taxation, but land robbery.

Mr. Cooley states a truth when he says: "The basis of all taxation is political necessity." He might well have added that its only legitimate object is the raising of money for public purposes.

There can be no political necessity for taxation except to provide means for carrying on government. What can be the political necessity or other justification, considered from a revenue standpoint, of forfeiting or confiscating land instead of taxing it and of distributing it to private persons for private purposes, instead of exacting from it its just and proportionate contribution to the general support of government, leaving the residue to the owner? How is it better or easier, viewed from a revenue standpoint, to forfeit land for private uses than to tax it for public purposes? A provision of law that does not in terms attempt nor in operation result in the production of revenue to the organization for whose benefit it purports to be is not taxation, whatever be the name given to it. A sentence of confiscation cannot be made taxation, nor even legislation, by calling it such, nor be justified thereby.

Judge Jackson does not in his opinion attempt to trench upon the ruling of this court that the constitution, statute, and judicial proceedings thereunder and the right of redemption therein given constitute, *where they all apply*, a valid system; but he holds and clearly shows that only the constitution applies where land is claimed under section 3 or where the suit must otherwise be dismissed and redemption denied or made ineffectual, if or where the constitution applies at all.

The ruling of the circuit court, if followed and sustained by this court, will not have the effect of taking from the State any taxing power nor a dollar of revenue. On the contrary, if the land-owner is permitted to redeem *all* his land that is called forfeited instead of only such as is not claimed adversely to him, it is manifest that the revenues of the State would be increased instead of diminished thereby.

Nor can any injustice be done to the adverse claimant by permitting the land-owner to redeem his title instead of its being transferred to the adverse claimant. The State owes to the adverse claimant only the equal protection of the laws—an opportunity to measure in the courts the strength of his title and possession upon equal terms with his opponent; not to receive his opponent's title as a gift from the State. Claims to land not based upon title originally superior nor made superior by adverse possession for the short statutory period of ten years are without merit. Courts and the States owe to the Constitution a higher obligation than they do to persons, be they few or many, who, being without valid title, may desire to receive, as a gratuity from the State, the title of another. The "settler" is in a position of indifference, for the statute of limitations has long ago taken care of him. The man who worries about the "home of the settler" is not the settler himself, but the speculator in wild land bought from the commissioner of school lands *ex parte*. Under said section 3 possession by the adverse claimant is not necessary to vest forfeited title in him where the claim and color of title is derived from the State. Payment of taxes for five years is enough. Nor does occupancy prevent forfeiture. Land actually occupied, cultivated, and improved can be forfeited

and the title thereto, improvements and all, transferred to and vested in the holder of a previously worthless color of title without possession—if the appellants are right and the circuit court wrong in their views of the law.

SECTION 6 OF ARTICLE 13 OF THE STATE CONSTITUTION CONTRARY TO THE EQUALITY CLAUSE OF FOURTEENTH AMENDMENT.

This objection to the forfeiture of tracts of 1,000 acres and more and not tracts of less size is sustained by the district judge in his opinion on the strength of the ruling of the State court that there is no ground for discrimination.

Section 39 of the act of April 9, 1873, referred to, is a re-enactment of section 6 of article 13 of the constitution, with a further and like provision relating to tracts of less than 1,000 acres. The act uses the same expression as the constitution: "When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more shall not," &c.; "and when for any five successive years after the passage of this act, the owner of any tract of land less in quantity than one thousand acres," &c. In both clauses the word used is "after." This act was amended and re-enacted by an act passed for that purpose March 24, 1882, and although the language of the former act was followed so far as it related to tracts of more than 1,000 acres, as to tracts of less it is as follows: "And when for any five successive years since the ninth day of April, one thousand eight hundred and seventy-three, the owner of any lot or tract of land, less in quantity than one thousand acres," &c. The only change is from

"after" to "since." The act of 1873 applied to all time after its passage; the act of 1882 applied to the time from April 9, 1873, up to the taking effect of the act of 1882, and not to time "after" the act (Stand. Dic.). This change could not have been accidental, but even if so, it had the effect, so far as it was effectual, to confirm prior forfeitures, but not to make future ones, as to tracts less than 1,000 acres. The act of 1873 was doing all that could be done in that direction by legislation.

There being, as was held in State *vs.* Swan, 46 W. Va., no good ground for the distinction made by section 6 of article 13, it is invalid as being class legislation.

Gulf, Colo. & Santa Fe R'y *vs.* Ellis, 165 U. S., 150.
State *vs.* Loomis, 115 Mo., 307.
State *vs.* Goodwill, 33 W. Va., 179.

If we suppose two men, neighbors, one having a tract of land of 999 acres and the other a tract of 1,000 acres, and both unassessed for the required time, it is not easy to see any good reason why they should fare differently and one tract be forfeited and perhaps vested in a stranger and the other not forfeited.

EXCESSIVE FINES AND CRUEL AND UNUSUAL PUNISHMENT.

Excessive fines and cruel and unusual punishment are contrary to the "old constitutional law of the land" in England, IV Blackstone's Coms., 379, and therefore prohibited to the States by the fourteenth amendment, as it is to the General Government by the eighth amendment. If, then, the forfeiture is to be regarded as in any sense a penalty, the

opinion of the supreme court of Kentucky in Gaines *vs.* Buford, 1 Dana, 480, upon an act that attempted to forfeit land for failure to make improvements, is pertinent. The court, per Judge Nichols, said:

"Thus, by comparing the act of 1824 with the Constitution, I find that while the legislature are expressly prohibited from passing laws to forfeit the estates of attained traitors and felons, except during life, they have undertaken to forfeit forever the estates of those who have been guilty of no crime, unless it be a crime to have the better title to a tract of land held adversely by another. This contrast fortifies my conviction that the legislature does not possess the power to pass a bill of forfeiture like this. When the estate of an attained felon can only be forfeited during life, is it not within the contemplation of the supreme law, an excessive fine or a cruel punishment to forfeit forever the estate of a man, merely because he is unwilling and fails to improve it, even if he could? The Constitution says 'that excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.'"

IMPAIRING THE OBLIGATION OF CONTRACT.

If we take the other horn of the dilemma and say the forfeiture is not a penalty, we encounter the objection that the Constitution impairs the obligation of the contract of Virginia with Robert Morris, his heirs and assigns, which was an unconditional grant of the land, and again we quote from the opinion of the Kentucky court in the same case:

"The act of 1824, now in question, does not treat the failure to improve as there required as a criminal or penal offense. The forfeiture is not placed upon the ground of punishment for a criminal act of commission or omission; but the whole tenor of the statute shows that the legislature

conceived they had constitutional power to require the citizen to improve his land as a condition upon which it should be held. It is an attempt to change the tenure of the property—to make the holding depend upon improvement as a new condition annexed to the estate instead of letting it rest upon the original contract. * * * The attempt thereafter by the vendor to resume the control is in violation of the manifest purpose and design of the contract and strikes at its essence."

CONCLUSION.

The land in controversy belongs either to the appellee or to the appellants. It is undisputed that immediately before the expiration of the year 1888 it belonged to Reed, the appellee's grantor, and not to Hatfield. Immediately after the expiration of that year it belonged, the appellants contend, to Hatfield and not to Reed. Hatfield did nothing to acquire the land. To reverse the decree in this case it is necessary to hold that the State constitution by force of its own operation alone effected the transfer of title—to hold that under the Constitution of the United States a State may by act of a legislative body deprive one private person of his property and give it to another, and that in the present case has actually done so; but this court, in Davidson *vs.* New Orleans, 96 U. S., 102, denies that "a State can make anything due process of law which by its own legislation it may choose to declare such. To affirm this," says the court, "is to hold that the prohibition to the State is of no avail or has no application where the invasion of private rights is effected under the form of State legislation." This would indeed make the mere will of a State superior to the national Constitution. To the same effect are Murray's Lessee *vs.*

Hoboken, 18 How., 276; Holden *vs.* Hardy, 169 U. S., 366; Ulman *vs.* Mayor, &c., of Baltimore, 72 Md., 587. The "operation" of the State constitution is neither due process nor any process of law whatever; it is a sentence of confiscation, of attainder.

The court is further referred to the following cases as having special bearing upon the questions involved herein:

Wong Wing *vs.* U. S., 163 U. S., 228.
Scharf, com'r, &c., *vs.* Tasker, 73 Md., 380.
Fisher *vs.* McGirr, 1 Gray, 1.
Boggs *vs.* The Commonwealth, 76 Va., 986.
Griffin *vs.* Mixon, 38 Miss., 424.
Hoke *vs.* Henderson, 4 Dev. Law.
Arrowsmith *vs.* Burlingin, 4 McLean, 494.
Kinney *vs.* Beverly, 2 Hen. & Munf., 318.
Barber *vs.* Nelson, 1 Lit., 60.

The opinion of Judge Jackson in this case is worthy of great consideration, both on account of its intrinsic force and on account of his long and intimate acquaintance with all laws affecting titles to lands in the Virginias. His biography would be a history of the land law of those States.

As was lately said by the public press upon his entering upon his fortieth year of continuous service upon the Federal bench without having missed a term of court in all that time:

"His experience has been a wonderful one. He has probably decided more questions of law than any other man living in this country; has had more to do with settling the titles to the lands in West Virginia than any other man who ever lived."

I cannot believe this court will have any difficulty in reaching the same conclusion that he has reached: that so far as the constitution or statutes of West Virginia undertake to forfeit land and vest the title thereto in another private person or vest it in the State, without the right of redemption, they are void as not "due process of law."

It is respectfully submitted that the decree of the circuit court should be affirmed.

MAYNARD F. STILES,
Counsel for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

BRIEF OF MAYNARD F. STILES.

STATEMENT.

King, the appellee, brought his bill against the appellants to annul certain patents and deeds under which they claimed, upon the ground that they were clouds upon his title to the tract of land claimed by him, showing by his bill that the defendants relied upon certain provisions of the constitution of the State which the complainant charged to be inapplicable to their case, but which, if applicable, were in contravention of the Constitution of the United States. To this bill the defendants appeared without process, by Henry C. Flesher, Esq., an attorney of the court,

and from a decree for plaintiff appealed to this court. Now *one* of the appellants, by other counsel, moves the court to dismiss the appeal, and at the same time annul the decree and disbar the said Flesher, upon the ground that his appearance was unauthorized and the cause fictitious. Sundry other persons, who are not parties to the suit, and only two of whom claim any interest in the land, and an attorney appearing for the State of West Virginia, but employed also by the moving appellant (p. 2 of Petitions and Exhibits), also file petitions by which they ask the same action, and also the disbarment of the counsel for plaintiff and appellee upon the same ground, and because, they say, the suit is collusive, a fraud upon the court, involves no controversy, but was brought for the sole purpose of obtaining from the court a ruling and opinion to be used against them in litigation pending or that might arise. Affidavits, records, and other documents have been filed in support of and in opposition to said motions and petitions.

However viewed, this is an unusual case, and in some respects probably is entirely unique.

The petitioners, the principal ones of whom had not sued or been sued by King, had, according to their avowal, long maintained an espionage over King, his counsel and agents and his cases in every court in the State, and failing, as they now claim, to notice the pendency of this suit, but more probably failing to appreciate the character of it, for which they seem to blame counsel therein, until it had been ordered for oral argument, they first apply for and get leave to file briefs in this court. Then an examination of the opinion of the learned judge is

made, the conclusion reached that its law and logic are irrefragable and sure to meet the approval of this court, and thereupon it is determined that in some way and by any means and at any hazard the case must, if possible, be pulled out of this court, and the affirmance of the opinion of the circuit court and the establishment of a precedent prevented.

In this emergency recourse is had to the special talents of John A. Sheppard. He has Mrs. Hatfield brought to his office and begins operations. Sheppard knew perfectly well what lands the suit affected, and that they were not the tracts upon which the appellant lived, yet he told her "that she would certainly have to move off if the Supreme Court of the United States sustained that decision" (p. 38). She was not sufficiently terrified, and thereupon he told her he "wanted to give her to understand plainly that the course she was taking in the case was establishing a precedent that would act to the prejudice of her neighbors and all others owning land inside the King claim."

Ex pede Herculem. It is easy to imagine the many threats of ostracism and other terrors and inducements resorted to that Mr. Sheppard did not deem it needful to report. He does not say, either, that in the absence of her counsel and without his knowledge he tried to engraft himself and associates upon the case as her counsel, but this appears from her letter to Major Flesher concerning this same interview (p. 49, Affidavits in Opposition, &c.).

This interview being unproductive of anything to the advancement of the plans of Sheppard and his associates, he sent Crocket Allison, a neighbor and one of the petitioners, after her, and in the course of a month or two she was

persuaded that she had nothing to hope for from appeal, and that the only way to save the land, even her home, that was not involved, but which she was led to suppose was included in the decree, was to make such an affidavit as Sheppard wished, and as would, he hoped, reverse and annul the whole case without going into the merits, and thus avoid a dreaded expression of opinion by this court, and at the same time eliminate from all future contests with these petitioners the principal counsel of Mr. King. This she was willing to do, if Sheppard's clients would guarantee her against failure of the plot, by agreeing to pay her for the land in event of its loss. Sheppard seems to have hesitated, but the others did not, for he says: "Afterwards I had a conference with associate counsel, and it was decided that I should obtain an affidavit from Mrs. Hatfield setting forth the agreement between her and Stiles, the representative of King, which I did on the 30th of September, 1901. *When she gave me the affidavit, I gave her a letter bearing the same date.* A copy of the letter is hereto attached" (p. 39, Petitions, &c.). A copy of the letter is *not* attached nor otherwise exhibited, but it is to be hoped, though it is not believed, that it creates more liability in favor of Mrs. Hatfield than does their Exhibit 25 (p. 106).

Such is in brief the petitioners' own account of the procuration of the affidavit upon which they, dripping and dribbling with corruption, come into a court of equity to make a charge of fraud against the appellee and of professional misconduct against counsel in the case. It is safe to say that no court was ever before treated to such a spectacle, and yet the diabolical humor of it seems to be wholly lost to the performers.

ARGUMENT.

The petitioners ask to intervene "not for the purpose of becoming parties to the above-entitled cause," but to prevent this court from rendering any opinion on the merits, upon the ground that such opinion may be used to their injury. This presumes that, in spite of any aid their counsel may give the court under its leave, the court will decide erroneously, for a correct decision can injure no one. The court will not adopt this presumption. They profess to fear that the court will give "the expression of such opinion or the determination of such facts as will operate as a complete bar" to their defenses in other suits.

It is not shown and it is not perceived how the court can determine any fact in this case that will bar Stuart Wood *et als.* if they keep out of the case, and the court will not withhold an opinion upon a question of law in this or any other case for the reason that it may become a legal precedent, an incident of every decision. If with them the facts are different, the precedent will not apply; if similar, they will have the benefit of the precedent. It is not believed that this court will humor the notion that Mr. King or any other person has no right to go into court with an adverse claimant except at the time, in the manner, and under the conditions that other independent adverse claimants may undertake to prescribe.

SUIT NOT FICTITIOUS, COLLUSIVE, FRAUDULENT, OR OTHERWISE IMPROPER.

The accused persons have not been content with a simple denial of the charges made against them by the petitioners, but have frankly and fully laid before this court, as it had been before the circuit court, a history of the whole case and all antecedent and surrounding circumstances, without regard to the effect, but in the consciousness that no impropriety existed in any of their acts. It is a distinct disappointment that certain of the opposing counsel did not justify their high repute for candor and fairness by a prompt recognition of the absence of turpitude in the conduct and purposes of the accused counsel, to an honest belief in whose baseness they might have been misled by false representations.

THE CASE NOT FICTITIOUS.

The complainant King is certainly no myth. The defendants are veritable beings, of full age and *sui juris*. This court has had previous evidence of the existence of the land claimed by the plaintiff, and no doubt can be entertained of the reality of his claim to it; and neither the defendants nor the petitioners for them have disavowed claim to the lands the bill says the defendants claim. The controversy over the land began a long time before this suit did, and seems to have some activity yet. Every element is substantial and real. But the petitioners say that King has agreed to give back the land after having won it, and they offer in proof of it the state-

ment of Mrs. Hatfield of an agreement made in 1895, the only agreement that it is pretended was ever made between her and any representative of King, or at least of which any evidence is offered. The agreement made at that time was lodged in court in the case to which it had special reference, and speaks for itself, and speaks of other land than that concerned here. It is not pretended that it had anything to do directly with this case, which was not brought till long afterwards, or that Mrs. Hatfield had any other agreement with any one about this case. The petitioners say she didn't know of the case until they told her. No agreement is referred to anywhere in the *evidence* except the one in 1895.

Mr. King may not have been represented by "able, efficient, and vigilant counsel," but his representatives have been counted men of ordinary sense, and the "brief for petitioners" says that one of them is an "intelligent, experienced lawyer." The question whether it is probable that any of them, aside from any higher consideration than common prudence, would go to an adverse claimant, a defendant in a pending suit, and make such preposterous statements and put up such a clumsy "job" as the affidavit of Mrs. Hatfield sets out, is a question that could well be submitted without denial or explanation; but the affidavits of Wilder and Shumate assert that the only agreement, except the release of some timber, that was made, and the only understanding that was had, was embodied in the written stipulation. Wilder, Shumate, King, and Stiles deny any knowledge of any agreement or understanding except the written stipulation.

The suit is as much a reality in every element and partic-

ular as ever was brought in any court, and there is a total want of evidence or ground of suspicion to the contrary.

NOT COLLUSIVE.

No evidence, direct or circumstantial, is offered by the petitioners in support of the charge that the suit was or is collusive, and, on the other hand, it is said by the complainant's counsel that "no previous consultation or communication or subsequent agreement was had with the defendants or their counsel" (p. 11, Stiles' affidavit); and the counsel for defendants says:

"I had no communication with M. F. Stiles or any one representing King about the present case prior to the time when said Stiles informed me he had brought this suit. I had nothing to do with the bringing of the suit and no knowledge or intimation prior to that time that such a suit was contemplated, and I was not 'procured' by him to appear thereto; * * * and any statement wherever made, that I entered into any collusion with any person, or sought to impose on the court * * * or that the case was, so far as I am concerned, fictitious or manufactured or in any way unreal, is without any basis of fact or truth whatever."

A suit is not necessarily collusive because opposing counsel do not undertake to get each other disbarred or to assassinate each other's character.

NOT FRAUDULENT.

The suit not being fictitious or collusive, it would seem to follow that it was not otherwise fraudulent; but the petitioners imply that it was a fraud in King not to sue Henry R. Phillips on account of an alleged claim to the coal under-

lying part of the land. This assumes that Mr. Stiles knew of him and his claim, which he did not, and that failure to sue him was for the purpose and had the effect of wronging some one, which it could not. Who and where Phillips was or is Mr. Stiles does not yet know, and he was no more a necessary party than if he had claimed adjacent instead of subjacent land, if in fact he did. He was not a party to the action of ejectment, but no objection has been made to that.

It is urged that the court of equity is without jurisdiction because the defendants were in possession, though alleged to be out of possession. This was a traversible allegation, but it was made in good faith, and the demurrer admitted it. Moreover, it was true, and is not shaken by the general statements of the defendants or others, that the defendants had lived on their lands for thirty years, the house and buildings and farm lands on which they had lived being on other and different tracts. If it should even be that the defendants' counsel made a mistake in fact or in judgment in resting his case on some other defense than possession, to reverse the decree for that reason would put a premium upon bad judgment and the omission of proper defenses.

The stipulation with the defendants could not have been fairer or more clearly advantageous to them, if we go back to that, and, if we do not, then there was no dealing with them at all, foul or fair.

In the "Brief for Petitioners" (p. 2) it is said: "Mr. Stiles does not deny that he did not have with Mrs. Hatfield the conversation recited in her affidavit." And the counsel complain that the denial is not explicit. This is either a misapprehension of Mr. Stiles' statement or is not a candid treatment of it. The only conversations or agreements

which the said Hatfield pretends ever to have had with Stiles, and the only one anywhere mentioned by her or any other witness, and the only conversation, time, or place to which his attention was in any way called, was the conversation alleged to have been had with him and Shumate at the said Hatfield's house "about the time the declaration in ejectment was served on her," which was prior to the first Monday of March, 1895, the return day of the declaration, and again about two months later. The stipulation was filed in court about the time it was signed, June 15, 1895.

It was the intention of Stiles to make his statement both general enough and specific enough to cover the whole subject, and this is what he said upon that point:

"That with the making of said stipulation *or of any agreement* with the appellants or either of them this affiant had nothing to do beyond making a draft for same, to be submitted to them or their counsel, and signing same (if at all) after the same had been signed by the other counsel, and the said appellant, Hatfield, *in every statement concerning this affiant* in her affidavit exhibited with the petitions aforesaid, is profoundly in error; for this affiant never in his lifetime up to the present moment was at the house of said Hatfield in company with said H. K. Shumate, was never in her presence anywhere with said Shumate, never was on said Ben creek, where she lived, with said Shumate, and to the best of his knowledge had never seen her until after the stipulation was filed in court, nor had any communication with her of any nature upon any subject whatever, *and this affiant knows nothing of any agreement or any negotiation for same* with said Hatfield other than is herein stated and what he learned from said Shumate and V. A. Wilder, whose affidavits will be presented herewith, and said Hatfield never met said Flesher anywhere at any time pursuant to any arrangement with this affiant."

The suggestion of counsel that possibly Stiles saw said Hatfield at some other time and place than that stated by her is not warranted by any statement of any person on either side of the case. Attention is called by petitioners' counsel to the admission of Stiles that he had been at the Hatfield house; but the affidavit states that he stopped there as a traveler, which explains itself to any one who knows that it is one of the customary and few places where travelers from Tug River to Logan Court-house stop for food and shelter for man or horse, and the occasion mentioned was long after the filing of the stipulation, and no reference to any business matter was made.

After the affidavits in opposition to the petitions were filed three so-called affidavits in rebuttal were filed by the petitioners. These are not in rebuttal, but are part of the petitioners' primary case, and were sworn to before any of the affidavits in opposition were drawn, and should have been filed before or not at all. They escaped attention until opportunity to move to strike them out had passed. I therefore take occasion and the liberty to say now, in the first person singular, and under the sanction of my oath as an attorney of this court, that neither at the time or place mentioned nor at any other time or place did I ever see or have any conversation with Mrs. Hatfield in the presence of H. K. Shumate, and was never nearer to her with him than five miles, to my knowledge, except when Mrs. Hatfield and Mrs. Rutherford came up to Parkersburg to court after the filing of the stipulation, up to which time I knew neither of them by sight and at which time I spoke to neither; and never at any time or place did I make statement, representation, or agreement to Mrs. Hatfield or any other

person bearing the remotest resemblance to anything stated in her affidavit. I do not know either Aley Browning or T. H. Graham, and I never saw either of them to know who they were, if I ever saw them at all. In 1894 and 1895, Wilder and Stiles were interchangeable terms, and both were strangers to most of the people of Ben Creek country. Their business and interest were the same, only their personalities being different, and they were not always differentiated. After 1895 Wilder returned to New York and the former duality became Stiles alone, who remained in the State and continued to be known. If it is worth while to account for the statements of Hatfield, Browning, and Graham on the basis of honest mistake, it can probably be done by the tendency to attribute all acts of either Wilder or Stiles to the latter, the *surviving* member of the combination.

As to the affidavit of Crocket Allison, it may be said that it is not strange that the affidavits of Sheppard and Mrs. Hatfield should be thought to require reinforcement in advance of attack. It is entirely probable that Mrs. Hatfield said to Sheppard what Allison says she did. He knew what Sheppard required of her and undertook to deliver it when he brought her back to Sheppard.

FRAUD UPON THE COURT.

One ground upon which the intervenors ask that this suit be dismissed is, "Because this suit is a fraud upon and a contempt of this and the circuit court."

This does not seem worthy of discussion. If there was no fraud upon or contempt of the circuit court, there is none upon this court. If they have any faith in their position,

let them make their complaint to Judge Jackson, who knew every detail of the case and of the previous relations of the parties, who had all the papers and the counsel before him and knew how the suit was brought and how conducted, who knew and knows the counsel long and intimately in their personal and professional characters and conduct, and who gave to the case the labor and the careful, elaborate, and learned consideration not likely to be bestowed upon a moot case and an academic question or a case that was tinctured with fraud.

THE EX-ATTORNEY GENERAL.

When the court directed the attorney general of West Virginia to be notified of the pendency of this appeal, Mr. Rucker, who had yet three weeks to serve and who was counsel for sundry claimants adverse to Mr. King, saw, as did his co-counsel and their clients, some of whom were members of the legislature then in session, an opportunity for "great moral effect" (the imagined result of many immoral acts), a good fee for Rucker, and a chance for all the lawyers who were opposed to King, or at least "such other counsel as such board (of public works) may see fit and be able to secure without any expense to the State," to come into the case with the prestige of counsel for the sovereign State of West Virginia, whose real interest is on the side of King, and so a resolution of the legislature to that end was procured. But the ostensible purpose and the authority given was not to dismiss the suit or disbar the counsel, but to present arguments in favor of the constitution. That being an unpromising task, Mr. Rucker examines the *ex parte* affidavits procured by his as-

sociates, makes no inquiry about the case from the counsel in it, concluded it would be "improper" for him to write a brief, for which he was supposed to be employed, and joins gleefully in the general hunt for the "scalp" of his opponent in numerous cases. He hasn't a word either for the State or for the appellant, Mrs. Browning, who says she has employed him. His one purpose is the crime of Cain, "that primal, eldest curse, a brother's blood."

AUTHORITY OF FLESHER TO APPEAR FOR THE DEFENDANTS.

In March, 1895, the action of ejectment of King *vs.* Altizer *et als.*, including both the appellants, was brought, and both the appellants were served with process therein, and James H. Ferguson entered appearance and plea for them and other defendants. By the service they were brought into court and had at least constructive notice, if not actual knowledge, of every subsequent act therein affecting them. After the talk between them, or Mrs. Hatfield, and Mr. Shumate and Colonel Wilder, Mrs. Hatfield and Major Flesher met on the railroad train, and she asked him "to represent her and her daughter, Mrs. Rutherford," and later sent him their papers (p. 42, Flesher's affidavit). Thereafter the stipulation signed by him as their counsel was filed in the case. Of this they had not only notice, but actual knowledge and gave approval, for when it was called in question by their codefendants not only did they refuse to retract it or disown Flesher as their counsel, but went to Parkersburg in support of it (p. 43, affidavit of Flesher; p. 25, affidavit of Wilder; p. 21, affidavit of Shumate). The withdrawal of Ferguson as counsel for them by special order (p. 29) is confirmatory evidence of their appointment and

recognition of Flesher as their counsel, and it is not easy to see how it could have been more complete. It is not in the least degree probable that they did not know the nature of the stipulation, but it is not in the least degree material whether they did or not.

The stipulation was never canceled, the case is still pending. Flesher has all the time been their counsel of record therein, appointed, ratified, and approved by them, as aforesaid, and his authority therein not questioned nor revoked by them.

That was the situation at the time the present suit was begun and the appeal taken and submitted, and while Mrs. Rutherford (or Browning) had been less active in the matter than Mrs. Hatfield, who acted for both, her appointment and recognition had been no less complete. Forms of action meant nothing to them, and their manifest and necessary intention was that Flesher should represent them in the King litigation.

Mark what Mrs. Hatfield said to Sheppard when he first attempted to foist himself and his associates upon her: "Mr. Sheppard wanted me to let him and others to be my attorney. I told him I had a lawyer to tend to my business"—not to attend to "King *vs.* Altizer *et als.*," nor even the present case only, but her "business."

"He wanted to write to you that I wanted you to take another lawyer to help you. I told him no, I would write to you myself, and if you wanted another lawyer it would be all right with me. If you want one, you be your own judge about the matter" (Mrs. Hatfield's letter to Flesher, p. 49).

More plenary authority a lawyer never had, so far as Mrs. Hatfield is concerned; and when we consider that this letter was written from the common home of Mrs. Hatfield and Mrs. Rutherford-Browning in February last, after the talk Sheppard had made about the case to Mrs. Hatfield; that during the months following, while Sheppard and Crocket Allison were at work on them, no word of disavowal or disapproval of Flesher's authority or acts had been made to him or to any one else, and not until after Mrs. Hatfield had been induced to make her affidavit of September 30—when we consider all this in connection with the employment and support of Flesher in King *vs.* Altizer *et als.*, we must conclude that Mrs. Browning regarded Major Flesher as her counsel, and that he was such, and that the affected surprise and indignation of her letter of October, 1901, to Rhodes was a made-to-order part of the subsequently devised plan of campaign.

That Flesher had authority to appear for both in the action of ejectment is beyond question; that he had the direct authorization of one of them, a cotenant, to prosecute this appeal, and approval of his appearance in the circuit court is likewise so beyond question that no motion is made in her behalf. As to both the defendants, the employment and authority as counsel originally given and still subsisting must be held, under the circumstances of this case, to extend to a suit between the same parties, in the same court, involving the same subject-matter and the same questions—the identical controversy.

An appearance by authorized counsel is as effectual to give jurisdiction of a party as the personal appearance of such party, and the appearance of either cures defects in or

want of process (Hill *vs.* Mendenhall, 21 Wall., 453; Pollard *vs.* Dwight, 4 Cr., 421; Creighton *vs.* Kerr, 20 Wall., 309), and if the authority of an attorney can be inquired into upon appeal, when the question was not raised in the court below, conclusive evidence ought surely to be required before a party or a stranger can be permitted in that way to annul a judgment or decree. It ought not to be done on motion and on purchased affidavits of ignorant people, drawn by counsel moved by the purposes disclosed in the present case.

There would be no safety to opposing parties if reliance could not be put upon the presumed authority of counsel.

In Osborne *vs.* Bank of United States, 9 Wheat., 739, Mr. Chief Justice Marshall for this court well says:

"Certain gentlemen first licensed by Government are admitted, by order of court, to stand at bar with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice we believe has existed from the first establishment of our courts, and no departure from it has been made in those of any State, or of the Union."

An attorney is as much an officer of the court as is the marshal, and equal recognition of the verity of his acts is daily given by the courts.

The jurisdiction of the court over the parties is always one of the first subjects of inquiry and must be presumed to have been examined into by the court, and where it depends upon the authority of counsel the court must be

presumed to have satisfied itself upon the matter before proceeding further and to have judicially settled the question.

"The presumption that the powers committed to a judicial tribunal of general jurisdiction have been properly exercised is essential to the repose and safety of society, and the inconvenience of allowing it to be met and overcome by parol evidence is greater than any benefit that can be derived from a different source. Public safety demands that when such a tribunal has pronounced a judgment *its adjudication of that subject should be as conclusive on the question whether the defendant was duly notified as on any other point essential to the determination of the cause.*" *Preston vs. Kindrick*, 27 S. E. Reporter (Va.), 578.

"The essence of estoppel by judgment is that there has been a judicial determination of a fact; and the question always is has there been such determination, and not upon what evidence, or by what means was it reached." *Last Chance Mining Company vs. Tyler Mining Company*, 157 U. S., 683.

The question concerning the effect of the appearance by an attorney whose authority was afterwards questioned came before this court in *Hills vs. Ross*, 3 Dallas, page 331, decided in 1796.

This was an action in admiralty, in which Joseph Clay, Jr., filed a plea for Ebenezer Hills, "one of the company of Hills, May & Woodbridge, in behalf of himself and his said copartners," the defendants. The replication treated this plea as that of the company, and the rejoinder was signed by "*Joseph Clay, Jr., proctor for the defendants.*" The decree below was against all the defendants, and a writ of error was sued out in all their names; but there was evidence on the record that May had been in Europe dur-

ing the whole proceedings, and no warrant of attorney or other authority to appear for him was produced.

It was contended by defendants in error that partners had no power to appear for each other in suits, and that in fact nothing appeared on the record to show that they had done so in this suit. The plaintiffs in error relied upon the rejoinder, where the proctor states himself to be employed by all the defendants, and insists that his authority cannot be examined in this stage of the case and this form of objection.

The chief justice delivered the opinion of the court, that in the present case *there was sufficient appearance of the defendants.*

In the case at bar the defendants claim as tenants in common, and the authority given by one of them is beyond all possible dispute.

In Shelton vs. Tiffin, 6 How., 163, relied upon by petitioners, it was held that the appearance of counsel, who testified that his appearance for L. P. Perry was an inadvertence, was an act of the counsel and not of the court, and did not contradict, but explained, the record; but the court said, "Had the entry been that L. P. Perry came personally into court and waived process, it could not have been controverted" (p. 186). It could not have been controverted simply because it would have been a fact judicially determined.

In this case the entry in one order is: "This day came the parties, by their counsel, and the defendants, by their counsel, tendered their joint demurrer," &c. (p. 23 of record).

The entry in the decree is: "This day came again the parties in open court, by their respective counsel, and the

defendants, by written waiver herein, declined to make answer to complainant's bill," &c.

These entries are acts of the *court*, and judicially determine the fact that the counsel tendering the demurrer and the counsel otherwise appearing for the defendants *was their counsel*, and is as incontrovertible as if it had been stated that the defendants came in person. It matters not "upon what evidence or by what means it was reached" (Last Chance Min'g Co. *vs.* Tyler Min'g Co., *supra*), the fact of the appearance of the defendants is as much adjudged and determined by the court as is any other question in the case and should only be reviewed here upon the record as it was made in the circuit court. If that question can be opened up and reheard upon new evidence in an appellate court there would seem to be no reason why any question in any case cannot be tried *de novo* and *ab initio* upon appeal and the distinction between appellate and original jurisdictions destroyed.

If the appellant Browning has suffered any injury her remedy is not by motion.

This court is a court of review and takes the case as the circuit court left it, upon the record as it was before that court. Mr. Flesher was and is an attorney and officer of that court and of this, and his acts within the customary scope of such attorney are entitled to every presumption of authority, right, and propriety, and the record suggests nothing to the contrary; and, it may be further said, the proof offered in this court shows nothing to the contrary. If, however, his appearance for the said defendant was without authority and was to her injury, or any act or omission of his was to her injury, he alone

should answer for that in damages to the extent of the injury, to be determined in an action against him. To annul the plaintiff's decree would be to visit upon the plaintiff a penalty for the acts and fault of opposing counsel. That would submit litigants to desperate hazard, and encourage the denial by the losing party of authority to his counsel, which it would seldom be possible for the prevailing party to establish. It would never be safe to prevail in the trial court.

If any attack upon the decree itself is open, it seems plain that it can only be for fraud of the plaintiff, and must be by independent bill in a court of proper original jurisdiction, where full hearing may be had and the witnesses subjected to examination. These propositions seem so plain as to need no citation of authority in their support, and, in the short time afforded for the purpose and in view of the evidence, no search has been made for them.

The petition should be stricken out and the motion overruled.

No doubt exists of the power of this court to dismiss an appeal, without disturbing the decree, when it properly appears that the controversy has terminated, such being the nature of the cases where the power has been exercised; but it is unnecessary to inquire what its power would be, or what action it would be proper to take upon the suggestion of a party or a stranger, in a case such as the petitioners in this case state, for no such case exists. It is submitted that, upon the record of the circuit court and the affidavits filed in this court, this case presents no feature different from ordinary causes, either in the circuit court or in this court, except the remarkable assault of the intruding petitioners

upon everybody and everything that does not meet their approval or serve their interests, and the extraordinary means and methods to which they confess they have resorted to procure evidence in support of their false assertions and false clamor and their effort to put a muzzle on this court; all which, it is submitted, ought to debar them even from representation in the consideration of the merits of this case.

The court is invited to examine the record from the circuit court, particularly the bill and the opinion of the learned judge (in the 14th line of which "1899" should read 1859), in connection with the affidavits filed in opposition to the petitions.

It is said that the present clerk finds no order approving bond and allowing appeal, but such order is found at page 45 of the record, certified by the then clerk of the court, and it is presumed that record is a verity that cannot be impeached by the failure of a successor in office to find the entry of it.

It is to be observed that there is no motion simply to dismiss the appeal, which the appellants would have the right to do, leaving the decree undisturbed, but the proposition is to quash the decree, and no motion whatever is made by one of the appellants.

It is submitted that upon the whole record every charge of fraud, fiction, collusion, or improper conduct against counsel of either party in the circuit court or this court, or of the plaintiff and appellee, or any representative or agent of his in either court, is fully repelled and shown to be wholly and wickedly false, and that the petitions and motions ought to be dismissed.

Respectfully, MAYNARD F. STILES.

No. 221.
Affidavit &c.

DEC 3 1901
JAMES H. MCKENNEY,
Clerk.

Filed Dec. 3, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

AFFIDAVITS AND EXHIBITS IN OPPOSITION TO PETITIONS AND MOTIONS OF NANCY C. BROWNING, STUART WOOD, AND OTHERS.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1901

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

The appellee, in opposition to the motion of Nancy C. Browning, presents the affidavits of Maynard F. Stiles and exhibits therewith; the affidavits of Henry C. King, V. A. Wilder, H. K. Shumate, and E. L. Buttrick, and the affidavit and exhibits of Henry C. Flesher, and says that no ground for said motion exists, but if she has any cause of complaint the same is properly cognizable in a court of original jurisdiction and upon original bill.

MAYNARD F. STILES, *Counsel.*

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

Now come the appellee, Henry C. King, and his counsel, Maynard F. Stiles, in opposition to the several petitions and motions of Stuart Wood *et als.*, Arthur D. Bright, A. M. Toler, and Edgar P. Rucker appearing for the State of West Virginia, and present the affidavit of Maynard F. Stiles and the exhibits therewith, the affidavits of Henry C. King, V. A. Wilder, H. K. Shumate, and E. L. Buttrick, and the affidavit and exhibits of Henry C. Flesher, and say that none of said petitioners was a party to said suit in the circuit court or is bound or affected by the decree appealed from or legally interested in the reversal or annulment thereof or entitled to the action prayed for, and any interest they or any of them may have or feel in any question of law arising on said appeal is fully protected by the leave heretofore given counsel to file briefs herein.

MAYNARD F. STILES, *Counsel.*

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

Affidavit of Maynard F. Stiles.

Maynard F. Stiles, being duly sworn, doth say:

That he, affiant, is and ever since 1893 has been the attorney, counsel, and solicitor of said Henry C. King in all suits and matters affecting the interest of said King in West Virginia.

That in view of the extraordinary character of the petitions presented in this cause in this court and of the grave personal consequences sought to be brought upon this affiant, and in order that this court may be fully advised of the situation, interests, conduct, and purposes of the several parties and their counsel as bearing upon the questions presented by said petitions and motions, this affiant is advised that it is proper to state the facts connected with the matters referred to in said petition or suggested thereby, as well as

the facts more directly material to this case, and therefore affiant says:

That when the said King purchased the Morris 500,000-acre grant he had no knowledge or information of any claim or contention that said land was forfeited, nor knowledge that any law or pretended law for forfeiting land existed, having made said purchase upon an abstract of title or examination made by an attorney who was unfamiliar with the provisions of the State constitution upon that subject; but when this affiant, who had had no connection with the said transaction, nor with said King until after said purchase, came to West Virginia to attend to the adjustment of such legal matters as might arise, he encountered the claim of forfeiture for non-assessment of taxes. He also discovered that within the five years next after the redemption in 1883, mentioned in the bill, and before any claim of forfeiture was or could be made, L. D. Chambers, commissioner of school land of Logan county, one of the petitioners herein, with Stuart Wood and others, had sold 150,000 acres of said land or more as waste and unappropriated land, in proceedings universally admitted to be void. Several thousand acres of said land, sold by him to himself and wife, said Margaret L. Chambers, petitioner, is now claimed in part by attorney and petitioner, C. W. Campbell, and a large portion of the rest of said land by the other said petitioners.

That about the time aforesaid, in 1893, a suit was instituted in the name of the State in the circuit court for Logan county against said Morris grant for the purpose of selling same for the benefit of the school fund, under the act of February 27, 1893, upon the ground that the title to said grant was, by forfeiture, then vested in the State, and John A. Sheppard, whose shameless account of the manner in which he professes to have suborned one of the appellants herein is exhibited with said petitions, was the attorney of record for said State, appointed by the commissioner of school lands, and was

also then, as now, one of the counsel for sundry of these petitioners and others, not parties to said suit, but who made claims hostile to said King.

That upon becoming cognizant of said suit said King, by affiant and H. K. Shumate, his attorneys, and V. A. Wilder, his agent, appeared and announced the desire, intention, and readiness of said King to pay the taxes on said land and be relieved of any claim of the State thereon, and his intention forthwith to file his petition to that end in said suit; whereupon, on the 9th day of January, 1894, the said Sheppard, in order, as affiant believes, to prevent such payment and to frustrate redemption by said King and his recovery of said land from said invalid claims, caused said suit to be dismissed.

That upon the dismissal of said suit being brought to the attention of the commissioner of school lands of Wyoming county, the suit mentioned in the bill was, at his instance, instituted in the circuit court for Wyoming county in May, 1894; whereupon the said Sheppard, in order to have the proceedings against said land under his control, to the end, as affiant believed and believes, that he might, in the interest of some of the petitioners herein, delay as long as possible redemption and payment of taxes by said King, caused the suit, that a few months before he had for the same reason dismissed, to be reinstated in said Logan circuit court, and in conjunction with C. W. Campbell, attorney and petitioner herein, and with the counsel for Stuart Wood, and the counsel for the Kountze Brothers, who are the real parties in interest, as affiant is informed, in a large quantity of land of which sundry of the "trustees," petitioners herein, are the ostensible claimants, and with the counsel for sundry other of the present petitioners, hastened to the said court for Wyoming county, and as "friends of the court," and without appearing in any way upon the record, harangued the court to dismiss said suit because of the pendency of the suit in Logan county, none of the persons

mentioned being party to either suit, and, failing to procure a dismissal of said suit, succeeded in having same remanded to rules for defect in the notice to the "unknown heirs" of one of said King's predecessors in title who had, as the records disclosed, parted with all title in his lifetime.

That the said King, by this affiant and H. K. Shumate, his attorneys, was ready at said term of court to file his answer and petition proffering and praying to pay all taxes and proper charges upon said land, notwithstanding said defective notice, and without regard to parties, and protested against the return of said cause to rules or any delay therein, but said cause was continued for the term; and at the next term, and at each succeeding term, sundry of the petitioners herein and the counsel aforesaid, without entering appearance for any person or disclosing any proper interest in said suit or putting themselves on the record, by interjecting objection of one sort and another occasioned continuance of said cause from term to term for more than two years, during which time four amended bills were filed, none of which related to any of said persons and accomplished nothing but delay to said King's effort to settle his taxes.

That in March, 1895, dispairing of making progress in said court against the guerrilla warfare waged against him, during which the land was being despoiled, and believing that there was no valid forfeiture of said lands, the said King instituted the action of ejectment entitled King *vs.* Altizer *et als.* in the circuit court for the district of West Virginia against a large number of defendants who set up claim of title to the greater portion of the land sold by the commissioner of school lands, as aforesaid, among the said defendants being the above-named appellants and M. B. Mullins, and Alexander McClintock who made pretense of a claim to a large portion of a 142,000-acre tract that had been forfeited to Virginia in the early part of the nineteenth century and had never been redeemed and was not in any way redeemable.

That the said King had paid a very large sum for said property and was under great expense about the same and desired the judgment of the court upon the rights and claims of the parties in the action he had brought to try title, and in order to present as simply as possible the paramount question of forfeiture, which was purely a question of law, before going into an expensive trial of the other leading question—that of boundary—the stipulation was entered into that is referred to in the bill (page 10 of the transcript) by which that question was to be argued and submitted. If the decision should be against the plaintiff it would preclude all other questions, but if for him the cause would proceed under the general plea of not guilty, and the plaintiff was to dismiss as to certain lands.

That with the making of said stipulation or of any agreement with the appellants or either of them this affiant had nothing to do beyond making a draft for same, to be submitted to them or their counsel, and signing same (if at all) after the same had been signed by the other counsel, and the said appellant, Hatfield, in every statement concerning this affiant in her affidavit exhibited with the petitions aforesaid, is profoundly in error; for this affiant never in his lifetime up to the present moment was at the house of said Hatfield in company with said H. K. Shumate, was never in her presence anywhere with said Shumate, never was on the said Ben creek, where she lived, with said Shumate, and to the best of his knowledge had never seen her until after the stipulation was filed in court, nor had any communication with her of any nature upon any subject whatever, and this affiant knows nothing of any agreement or any negotiation for same with said Hatfield other than is herein stated and what he learned from said Shumate and V. A. Wilder, whose affidavits will be presented herewith, and said Hatfield never met said Flesher anywhere at any time pursuant to any arrangement with this affiant.

That after said stipulation was filed in court some of the

other defendants in the case, who had sought to control the course of all litigation affecting said King and his land, whether parties to it or not, endeavored to induce the defendants, in whose names the same had been signed, to renounce the said stipulation and deny the authority of Major Flesher to act for them, and caused the rule and order to be entered that is presented with the petitions herein. Shortly thereafter, the counsel who had made complaint being in court, said Shumate stated to the court the circumstances of the making and signing of said stipulation, and the judge being satisfied therewith and declaring that he had "known Henry Flesher for a great many years (stating how long), and that he did not believe he had acted for the parties without believing he was authorized to do so," nothing was done under the rule, but so much of the stipulation as related to Claypool was stricken out by consent. Upon the filing of the declaration James H. Ferguson, Esq., had appeared and entered a plea of not guilty for all the defendants, but after the stipulation had been filed and agitated said Ferguson withdrew as the counsel of said Hatfield and Rutherford. (See order of court, hereto attached, marked "Exhibit No. 1.")

That, according to the terms of said stipulation, the question of the forfeiture of the plaintiff's title was set down to be argued in advance of the other questions in the case, and was thrown open to all comers (see order herewith, marked Exhibit No. 2), and under said order printed briefs were filed by this affiant and said Shumate and E. L. Buttrick, Esq., on the part of the plaintiff, and by sundry counsel in opposition, among them W. P. Hubbard, of counsel for the petitioners aforesaid, but the judge being prevented by illness from considering the question at that time, it was not taken up for decision until at the end of two long and expensive trials of the Mullins case, when it was disposed of without argument, upon the submission of an instruction by the defendants. The case was brought to this court by the

plaintiff, was submitted under rule 20, the submission was set aside by the court and oral argument ordered and notice sent to the attorney general of West Virginia, Mr. Edgar P. Rucker, who did not *then* think the State was concerned and who paid no attention to the case. In May, 1898, the judgment was affirmed.

That during the pendency of "King *vs.* Mullins" in this court and before the same had been ordered for oral argument, the said King, still willing to pay any taxes that were due the State, in June, 1896, filed his answer in the said suit in Wyoming county, denying the forfeiture, but offering to pay the taxes, and his opponents, being without other resources for further obstruction, filed a petition in said suit in the name of Alexander McClintock, who was not a party to said suit, claiming title to the Clinton 142,000-acre grant, denying the jurisdiction of the court over King and the Morris grant, and praying that King be not permitted to redeem, etc. Long before the filing of said petition all the real and other property, effects, and affairs of the said McClintock in West Virginia had been vested in Z. T. Vinson, as receiver appointed by the United States circuit court for the district of West Virginia (see page 86 of petitioners' "Petitions and Exhibits"), on the application of said McClintock, no mention of which fact and of the consequent incapacity of said McClintock to file said petition was made therein or otherwise by said McClintock or by said Vinson, whose name appears on said petition as counsel, with others, for said McClintock, and said petition was purely an obstructive expedient.

That in the fall of 1896 a stipulation was made on behalf of said King and said McClintock, and signed in their behalf by affiant and said John A. Sheppard, for the continuance of said cause of State *vs.* King in Wyoming county, the State not being a party to said stipulation, but in March, 1897, on the motion of the State, in the absence of this affiant and without his knowledge, but in the presence and

with the knowledge and without the objection of one of the counsel of record for said McClintock, an order was made to proceed with the cause; and in September following the decree of redemption exhibited with the bill in this cause was rendered.

That soon thereafter a suit was brought in said court, not in the name of said McClintock, but in the name of said Vinson as receiver, who had not been a party and was not privy to said suit of State *vs.* King, his appointment having been made and all his rights, if any he had, having accrued prior to the institution of said suit, to set aside said decree as having been procured by fraud upon said McClintock through violation of said stipulation and other alleged misbehavior of this affiant, every which charge of fraud was and is false, and upon said bill, upon an *ex parte* application, secured the injunction which, with the bill of said Vinson, the petitioners aforesaid have deemed material to their application and have set out as their Exhibit No. 19. The defendant King removed said cause into the United States circuit court, demurred to the bill, and, the demurrer being sustained, an amended bill, making a different but no better case, was filed, and the said King traversed the same by sworn answer, and up to the present term no action had been taken by said Vinson, receiver, to bring said cause to hearing.

That the said Sheppard and his associates, who had borrowed the receivership of Vinson for the purpose of bringing said suit, not being satisfied with the promise thereof in a Federal court, with the aid of said C. W. Campbell, and in the hope of embarrassing said King by disbarring his counsel, embodied the allegations of said bill and sundry other falsehoods and calumnies in an affidavit, upon which the judge of said Wyoming court, to whom it had been shown that some of his friends and relatives, though not parties to the suit of State *vs.* King, might be deprived of the defense of forfeiture, upon which they had previously relied, awarded

a rule against this affiant, and upon the hearing thereof, despite the total want of proof in support of any charge and full proof in refutation of every charge, entered the judgment that is recited in the petition of said Stuart Wood *et als.*

It would have saved this affiant the trouble of referring to this matter if said Stuart Wood *et als.* had been more explicit upon the subject, and had said that upon writ of error the supreme court of appeals, every member of which was personally well acquainted with this affiant and said Sheppard, unanimously reversed the finding and judgment of the circuit judge, because the evidence, and particularly the statements of the judge himself, disproved the charges, the court finding occasion to announce the rule that "the power to disbar an attorney is not an arbitrary and despotic one, to be exercised at the pleasure of the court or from passion, prejudice, or personal hostility."

The opinion of said supreme court of appeals in said cause (37 S. E., 620) and its judgment thereon are hereto annexed as Exhibits No. 3 and No. 4.

In harmony with the general course of the persons interested in the petition herein was the time and manner chosen for notifying affiant of their application to this court for his disbarment and degradation, the notice of said application being handed to affiant in the court-room of the United States circuit court of appeals by said Z. T. Vinson, who had concluded his argument in a case against said King, defendant in error, and just as affiant was about to begin his argument for said King.

That said proceeding was not instituted or conducted by any public authority, but exclusively by said John A. Sheppard and C. W. Campbell, aided, abetted, and assisted by one —— Ashbridge, the general agent of said Stuart Wood, and by one R. T. W. Duke, Jr., the general counsel in West Virginia of the said Kountze Brothers, the real claimants, as affiant is informed, of about 35,000 acres of said land, to which the apparent title adverse to King stands in the names

of those petitioners herein whose sham promise of indemnity to said Hatfield, to be made through said Sheppard, as the price of her false affidavit, is exhibited to this court as their "Exhibit No. 25." And affiant is advised that as against said persons at least the finding, judgment, and opinion of said supreme court of appeals are conclusive of the falsity and groundlessness of the charges against this affiant contained in the affidavit of said Sheppard in said proceeding.

That the said petitioners have failed to mention another instance of the systematic persecution to which they have subjected this affiant because of his efforts to protect and secure the rights of his said client. It is this: About the time aforesaid the commissioner of school lands of Logan county, J. W. Hinchman (one of the petitioners with Stuart Wood), had offered for sale a large body of land claimed to be within said Morris grant, under a decree that affiant deemed to be void, rendered in a proceeding to which neither affiant nor said King was a party or of which he had notice or knowledge. Affiant therefore brought a suit on behalf of said King in the United States circuit court to restrain said sale; whereupon the said State court, upon a rule for contempt, and to curb "the usurpations of the Federal courts," committed affiant to the county jail until said injunction should be dissolved; and affiant, refusing to dissolve said injunction, spent a week in jail before he could secure his release upon *habeas corpus* from the Federal court, during which time the prohibited sale was made; which release of affiant said Edgar P. Rucker and Z. T. Vinson opposed on the hearing of the writ.

A copy of the judgment of commitment and order of discharge are hereto annexed as Exhibts No. 5 and No. 6.

That it is true that an appeal from said decree of redemption of September 30, 1897, was taken to the supreme court of appeals of said State, notwithstanding the fact that said State had received and still retains the money paid thereunder by said King, which said appeal was

applied for, prosecuted, argued, and paid for by the petitioners herein and their counsel, but the same had not been applied for when the present suit was brought, though more than a year had elapsed since the decree was entered, and subsequently said decree was reversed, so far as it fixed the amount of taxes and so far as it permitted a redemption by reason of the payment of said amount, and was affirmed in all other respects; but the right to maintain said bill and the right to the relief prayed for did not in any degree depend upon said decree, which by its terms and the terms of the statute, construed as contended for by the defendants, could in no way affect them or their lands. The learned judge did not base his decision upon anything in the decree of redemption.

And affiant further says:

That this said suit was regularly brought and regularly proceeded in, and any statement to the contrary is not true and is an unwarranted reflection upon the circuit court. No previous consultation or communication or subsequent agreement was had with the defendants or their counsel, but, the bill having been filed, the recognized counsel of the defendants was asked by affiant, in view of the previous stipulation and in order to save cost, to waive process, which he did. The suit, while not within the terms of the former stipulation, was to such extent related to it as to suggest the propriety of calling the attention and recollection of the court to the former stipulation and proceedings by a direct reference thereto in the bill.

That it was the practice of the said court in which this suit was brought to make out before each term a docket of all pending cases, and to notify all attorneys having cases in said court several days in advance on what day all cases on the docket would be called, and all such attorneys were expected to be present, and this case was regularly on said docket for the two years that the same was pending in said

court, and was regularly called with all other cases. (See certificate of clerk, hereto attached as Exhibit No. 7.)

That this affiant doubts not nor denies, but is well aware, that the said Stuart Wood and his copetitioners "*are represented by able, efficient, and vigilant counsel*," and that "*both they and their attorneys have been alert and vigilant in their efforts to acquire knowledge of all the proceedings of every description undertaken by Henry C. King and those who represent him for the recovery of any part of said Morris grant in any of said courts in West Virginia*," whether the same concerned them or not, and have been "alert and vigilant" to pursue this affiant, his client, and his cause with false accusations and wanton aspersion with remorseless persistency and causeless malignity from court to court and case to case, breathing into the surrounding atmosphere of the courts, through every public or secret approach, the pestilential miasma of prejudice, in their efforts to demoralize and disarm said King; but this affiant is not advised that those facts impose upon affiant, whose habit it is to mind exclusively his own business, any obligation to notify persons not party or counsel in a suit of matters of public transaction in the courts, or that the failure of such persons, or or their able and vigilant counsel, to become acquainted with matters *inter alios* is ground for the subversion of the judgments or decrees of court therein, or for disbarment of counsel.

That Henry C. Flesher never was the counsel of Henry C. King in any cause or transaction in court or out of court, and, to the best and utmost of this affiant's knowledge and belief, never saw or had any communication with him, and in this case the said Flesher did not in any manner whatever represent said King.

That every averment in said bill was made in good faith, and this affiant believed them to be and still avers them to be true. The complainant had long been, then was, and still is in the actual possession, occupancy, and

enjoyment of said tract by his tenants and agents, except such parts as were or are in the actual adverse possession of others, which is not the case, as affiant was informed and believed and still believes, with those tracts claimed by the appellants that are affected by this suit. This affiant was not familiar with the lands claimed by the appellants, and had no personal knowledge of the particular location of any of the tracts claimed by said appellants, but he was informed before said suit was brought and at or before the time the stipulation aforesaid was made that there was and had been no adverse possession of any of the lands claimed by said appellants, *except such as are not affected by this bill*, of which latter tracts they undoubtedly did have possession. This affiant had never been on any of said tracts, nor on any other lands claimed by the appellants except in passing along the public road and stopping once or twice at said Hatfield's house as a traveler, at which time no mention of lands or any business matter was made, but he was and is informed that *all the buildings, improvements, and possessions of said appellants are wholly confined to the lands not affected by this suit.* If A. M. Toler claims any portion of said 330-acre tract, it cannot be told from the scrap of a deed he exhibits (page 65), nor does the deed to Phillips for minerals (page 76) make any reference to the tracts affected by the bill, and if it embraces any of them it does not so appear from the deed, and affiant had no knowledge of it, and said Phillips could not be in possession.

That said suit was not brought for any purpose not shown by the bill, nor by collusion or agreement, nor by any misrepresentation of fact; but every matter, fact, and thing was fairly, frankly, and openly put before the court and understood by the learned judge, who had long been familiar with complainant's title and with the whole transaction and all surrounding circumstances, and was received by him and long and carefully and learnedly considered. If the sole

defense to the bill is "fictitious," it is the defense upon which the petitioners aver that they wish to rely in their controversies with King.

That it is true that this affiant and his client desired the decision of the court upon the matter presented by said bill and upon the rights therein claimed; otherwise he would not have brought said suit. This affiant knows of no other way to determine litigated matters, and has always been as ready and anxious to submit his rights and claims to the judgment of the court as the intruding petitioners have been reluctant to do the like and anxious to avoid judicial test of their pretensions. But affiant denies every allegation and suggestion that said cause was improperly inspired or collusively concocted or had or has the purpose asserted by said petitioners, or that the same was or is in any respect fictitious or tainted with any improper or unprofessional act, practice, or design; and the opinion of the court, which affiant is charged with endeavoring to procure, was not reduced to writing until after appeal had been applied for, the learned judge then deeming it proper that the reasoning by which he had reached his conclusion should be fully stated. This affiant is willing that his conduct and purpose and those of his client in taking the judgment of the court on his right and claims should be compared with the methods of the petitioners and their counsel to prevent a decision upon the merits of a cause to which they are not party.

And concerning the matters and statements contained in the affidavit of John A. Sheppard, page 98 of "Petitions and Exhibits," this affiant says:

That he knows nothing of the whereabouts of the papers in the case of King *vs.* Altizer; that he never, to the best of his recollection, had them outside the clerk's office or the court-room and has no recollection of seeing them since some time in 1896, when he presented to the clerk a printed copy

of the transcript of King *vs.* Mullins and saw the clerk insert the same in said papers.

That if the papers in said case of King *vs.* Hatfield were kept out of the clerk's office at any time they were in the hands of the judge, who, upon submission of the demurrer, took the papers and retained the case under consideration for several months, and subsequently had them while writing his opinion.

That some time after the appeal in said cause had been allowed this affiant was at court at Parkersburg, where Judge Jackson resides, and upon returning to Charleston the said judge, having no further use for said papers, requested affiant to deliver them to the clerk at Charleston.

That on affiant's way to Charleston said Henry C. Flesher, attorney of the defendants, came aboard the train, and affiant spoke to him of the said appeal, and proposed a submission of said cause, as had been done in the case of King *vs.* Mullins, which was agreed upon, and as said Flesher was then on his way to Welch and the time for filing transcript and submitting the cause was short, said Flesher requested affiant to have the clerk get out the record at once, and in order to expedite the matter affiant furnished to the clerk copies of such of the papers as affiant, according to his custom, had preserved, and had copies made of the others and furnished the same to the clerk, and delivered to him the papers that had been transmitted by said judge, and the clerk hesitating to certify and forward the record without previous payment therefor, affiant offered to be answerable therefor if the appellants should refuse or fail to pay it. Affiant has not been required nor requested to pay it, and is informed by the clerk that it was paid by appellants or their counsel.

Affiant further says:

That since the decision of said cause the said King has in the proceeding had in said cause of State *vs.* King released the lands that under the stipulation filed in said cause of

King *vs.* Altizer said King agreed to dismiss from said suit, except surface rights upon one tract as well as more than five hundred tracts occupied and claimed by other persons, being all the occupied lands known to affiant in Logan, Mingo, and McDowell counties, but the same was done not because of said stipulation or any agreement, but because said King contested only for the wild lands.

That the said King has never brought any suit or action against the petitioners, C. W. Campbell, J. L. Caldwell, John Q. Dickinson, nor, to the best of affiant's present recollection, against said Stuart Wood, nor against said Egbert Mills, Egbert Mills, trustee; Arthur D. Bright, Arthur D. Bright, trustee; William H. Lawson, and William Kronenwelt, who are unknown in West Virginia, but are understood by affiant to be mere title-holders for said Kountze Bros.; but said persons and their vendors, having for years abused the process of the State courts in obstructing the payment of taxes by said King in suits to which they were not parties, and having reached the limit of possibilities and toleration as "friends of the court," in July last, and long after the setting aside of the submission of this cause, procured themselves to be made parties to said cause of State *vs.* King in the State court, and filed therein what they call answers, which are devoted to resistance to King's offer to pay the taxes on the land he claims, and to a claim of title adverse to said King to thousands of acres of land by virtue of his nonpayment of taxes which they and their attorneys and agents have occasioned. These persons are the real petitioners herein, the others being united chiefly for show of numbers, and said suit of State against King is the one for the purposes of which they want this affiant disbarred and the decision of this cause upon the merits, in which they see no hope, withheld.

This affiant deeply deplores the necessity of referring, even in self-defense, to acts of counsel or parties in other cases that seem to him reprehensible, and he does so, not

for love of it nor for the sake of retaliation, but because, in his opinion, those acts have a legitimate bearing upon the force to be given to their present complaints, accusations, and criticisms, and throw a proper side light upon the astounding course and methods that they have the audacity to proclaim have been resorted to in behalf of the said petitioners in the present case.

This affiant refers to and relies upon the affidavit of Henry C. Flesher and the stipulation and letter thereto annexed, and the affidavits of Henry C. King, V. A. Wilder, H. K. Shumate, and E. L. Buttrick, herewith presented.

MAYNARD F. STILES.

Subscribed and sworn to before me this 2d day of December, 1901, in the District of Columbia and city of Washington. Witness my hand and official seal.

CORNELIUS ECKHARDT,
Notary Public.

Affidavit of Henry C. King.

DISTRICT OF COLUMBIA, }
City of Washington, } ss:

Henry C. King, being by me duly sworn, doth say:

That he is the appellee in the cause now pending in the Supreme Court of the United States, under the title "S. D. Hatfield and Nancy C. Rutherford, appellants, *vs.* Henry C. King, appellee."

That Henry C. Flesher, who appears as counsel for said Hatfield and Rutherford in said court and in the circuit court, is not now and never has been the counsel, solicitor, or attorney of affiant in said cause or in any other cause, transaction, matter, or thing, or his agent, at any time or for any purpose whatever, and never has been employed or retained as such, and has never rendered any services to

affiant nor to any other person whomsoever at the procurement or instance of affiant.

That the only agreement, arrangement, or understanding on the part of this affiant and said Hatfield and Rutherford or either of them ever authorized by this affiant or of which he has any information is the one filed in court and referred to in affiant's bill in the aforesaid cause.

That the only persons at any time authorized to employ counsel for affiant in any matter or for any purpose relating to affiant or his affairs in West Virginia are Maynard F. Stiles, his attorney and counsel, and V. A. Wilder, who has been an agent of affiant in and about the business affairs of affiant in Virginia and West Virginia.

That very soon after the trial of the cause of this affiant against M. B. Mullins, in the circuit court of the United States for the district of West Virginia, said Mullins being one of the defendants in the cause entitled Henry C. King *vs.* S. S. Altizer *et als.*, and about the last of January, 1896, the said V. A. Wilder returned to New York, and from that time until within three or four months last past remained continuously in and about New York, under affiant's observation, and, to the best of affiant's knowledge and belief, was not thereafter in the State of West Virginia, except for the period of three or four days in September, 1897.

HENRY C. KING.

Subscribed and sworn to before me this 26th day of November, 1901, in my district aforesaid, as witness my hand and official seal.

[SEAL.]

CHARLES L. BUNDY,
Notary Public, D. C.

Affidavit of H. K. Shumate.

STATE OF WEST VIRGINIA, }
County of Kanawha, } *ss:*

H. K. Shumate, being duly sworn, on oath states:

That he was one of the attorneys for H. C. King in the case of King *vs.* S. S. Altizer *et als.*, in ejectment, pending in the United States circuit court for the district of West Virginia.

Affiant states that some time in the year 1895, while said suit was pending in said court, it was deemed expedient by the attorneys for Mr. King that a decision be had upon the forfeiture question arising in said cause, apart from the other issues, at as early date as practicable, and there seemed to be a disposition upon the part of many of the defendants or their counsel to delay the same.

Affiant was called upon to select one or more of the defendants who also desired speedy trial and whose lands would involve such question of forfeiture to its broadest extent. Among those who desired such speedy trial and held diversified interests were Mrs. Sarah D. Hatfield and her daughter, then Mrs. Nancy C. Rutherford, now Mrs. Nancy C. Browning.

The affiant called upon Mrs. Hatfield and her daughter and proposed to them an early settlement of such question. At the time an injunction was in force against them, enjoining them from cutting and removing timber from the lands claimed by them, which timber they had contracted to another, one A. B. Crum, who was also exceedingly anxious to cut and remove said timber.

This affiant further states that he made an arrangement with said parties which was substantially set out in a stipulation filed with the papers in the cause of King *vs.* Altizer *et al.*, and which was the whole agreement, so far as this affiant remembers, made with them, except as to the timber

which Mrs. Hatfield and Mrs. Rutherford had sold to Mr. Crum. In this matter it was agreed that Mr. Crum could proceed under his contract and cut and remove said timber, and that they (Mrs. Hatfield and Rutherford) might receive the proceeds thereof to their own use. This action was induced to considerable extent by the representations made by Mrs. Hatfield of her pecuniary inability to make a separate defense. At Mrs. Hatfield's request this affiant suggested to her the employment of Maj. H. C. Flesher, as a competent attorney, who was well versed in land law and one who was not employed by the other defendants, from whom she would sever. She requested that affiant mention the matter to Major Flesher, which he subsequently did. At the time the affiant suggested the employment of Maj. H. C. Flesher he had not seen him, nor had any communication with him in any way, directly or indirectly, concerning such employment.

Affiant further states that he made no agreement or arrangement with Major Flesher for the payment of any fees as counsel for Mrs. Hatfield, nor has he any knowledge of any such arrangement being made by any one whatever. So far as this affiant is informed, Major Flesher was at no time in the employment of Mr. King or any of his agents.

After this affiant entered into said agreement with Mrs. Hatfield and Mrs. Rutherford, to satisfy them that such agreement would be faithfully carried out this affiant had Colonel V. A. Wilder, who was then the active agent for Mr. King, to accompany him to their house, and to assure them that the agreement that the affiant had made with them would be carried out in good faith. This said Wilder did, telling them that whatever affiant had agreed to should be done.

To the best of affiant's recollection, M. F. Stiles, Esq., then and now counsel for Mr. King, was not present at either of the times aforesaid, and that Colonel Wilder only was pres-

ent to sanction the agreement. He has no recollection that said Stiles was ever there with affiant at any time.

The affiant further states that some time after said stipulation was filed a contention arose at Parkersburg over the authority of Major Flesher to represent Mrs. Hatfield, Mrs. Rutherford, and William Claypool in the stipulation. To ratify such authority upon their part, Mrs. Hatfield and Mrs. Rutherford both came to Parkersburg. The portion relating to Mr. Claypool was stricken out, and as to Mrs. Hatfield and Mrs. Rutherford it was retained in force.

This affiant further says that his employment as active attorney for said King ceased in 1896, and he had no connection with the chancery suit of King *vs.* Hatfield *et al.*, brought in 1898.

H. K. SHUMATE.

Subscribed and sworn to before me this 25th day of November, 1901, in my county aforesaid.

Witness my hand and official seal.

R. S. SPILLMAN,

[SEAL.] *Notary Public of said County of Kanawha, W. Va.*

Affidavit of V. A. Wilder.

STATE OF WEST VIRGINIA, *County of Kanawha,* } *ss:*

V. A. Wilder, being duly sworn, doth say:

That he is fifty-seven years of age and a citizen and resident of New York.

That during the years 1893, 1894, and 1895 affiant was the agent of Henry C. King in and about his affairs in West Virginia, relating to the Robert Morris 500,000-acre grant.

That after the institution of the action of ejectment, entitled King *vs.* Altizer *et als.*, in the United States circuit court

in 1895, affiant and said King and his counsel became anxious for a trial thereof, which there seemed to be a general disposition on the part of the defendants to delay, as they had delayed and thwarted the efforts of said King to adjust the matter of redemption and payment of taxes on said land in suits pending in Logan and Wyoming counties, and affiant urged the counsel of said King to bring said cause on for trial as to some of said defendants as soon as the same could reasonably be done.

That H. K. Shumate, one of said counsel, being well acquainted with most of said defendants, informed affiant that he probably could arrange with certain of them to go to trial without unnecessary delay, among the defendants suggested being Mrs. S. D. Hatfield and Mrs. Nancy C. Rutherford, who had been enjoined from cutting timber on said land, and in pursuance of said suggestion this affiant and said Shumate saw said parties at their residence on Ben creek, in Mingo county, while passing through the country, and an agreement was arrived at for the trial of said cause as to said parties, the terms of which were embodied in a written stipulation afterwards filed in said cause of King *vs.* Altizer *et als.*, and said stipulation embodied the only agreement or understanding that was ever made or had between either of said parties and this affiant or any representative of said King of which this affiant has ever heard or has any knowledge or information.

That Maynard F. Stiles, the attorney and counsel of said King, was not present upon the occasion mentioned, and to affiant's certain knowledge was not acquainted with and had never met the said Hatfield or Rutherford at that time nor at the time said stipulation was filed in court.

That affiant has read a printed copy of the affidavit of said Hatfield, filed in the case of Hatfield *et al. vs.* King, in the Supreme Court of the United States, and believes that the conversation therein alleged to have been had with H. K. Shumate and M. F. Stiles refers to the conversation

with said Shumate and this affiant, as aforesaid, and not to any other.

That affiant or said Shumate stated that by the arrangement proposed the expense and labor of a trial of the question of title between them would be much lessened without loss of right or advantage to either party, and that in this way in no event could the home of the said Hatfield and Rutherford be jeopardized; and because the said Hatfield had, as she said, used up her available money in other litigation, affiant gave permission to remove and dispose of some timber that, as affiant now remembers, had been cut prior to the injunction.

That at the time aforesaid the opposition to said King had been syndicated by the large land claimants, such as the Kountze Brothers, of New York; Stuart Wood, of Philadelphia; J. A. Nighbert, and others, and their attorneys, who were opposed to any independent action on the part of any defendant or any person having claims or interests adverse to said King, and opposed to any action whatever that was not taken through or did not yield tribute to them, and the said Hatfield, seeming not to be well disposed towards the attorneys representing the said persons, and wishing to act independently of them, asked said Shumate who would be a good lawyer to represent her, and said Shumate suggested some man, probably Major Flesher, as a competent land lawyer. At that time affiant was not acquainted with said Flesher and the name made no impression upon affiant's mind.

That said Flesher was not then nor at any time before or afterwards the attorney of said King nor connected with him or his interests in any manner whatsoever, and neither affiant nor said Shumate so told said Hatfield or any other person, nor did they or either of them promise her to pay him, nor was he employed by said King to represent said Hatfield, nor did affiant or said Shumate tell her or any other person at any time that they or said King had certain

lawyers or any lawyers employed who would take cases for other persons and then work in the interest of said King, nor was such the fact.

That said agreement was made willingly and with apparently perfect understanding on the part of said Hatfield and Rutherford, the said Hatfield being anxious to make the same, and in good faith on the part of this affiant and said Shumate, and was faithfully set out in the written stipulation aforesaid.

That affiant has read a printed copy of the affidavit of William Claypool, filed in said Supreme Court, and this affiant says that no such conversation as is therein stated ever occurred, but the facts concerning the same are that said Shumate told the said Claypool that an arrangement had been made with some of the defendants for a trial of the King suit as to them, and that he would like to have some one from that part of the country go to trial at the same time and in the same way, which could be done at trifling expense, as the other counsel in the case would, while defending the case for them, necessarily have to defend it as to said Claypool, the questions involved being in substance the same, which was entirely true. Claypool readily assented, and it was agreed that the lands of which he had title by possession should be dismissed from the suit. No promise was made to pay his costs or his counsel, nor was any counsel of said King to appear for said Claypool.

That upon the filing of the stipulation aforesaid in the circuit court and upon the same becoming known to the attorneys of some of the other defendants, emissaries were dispatched by them, as affiant is informed and believes, to the said Claypool and to the said Hatfield and Rutherford, who endeavored by threats, intimidation, and other influence to induce them to repudiate said agreements and the authority of said Flesher to sign said stipulation. In the case of Claypool they succeeded, and he withdrew from the

agreement, but said Hatfield and Rutherford adhered to said agreement, and when the authority of said Flesher to sign said stipulation for them and said Claypool was raised by the attorneys of other parties the said Hatfield and Rutherford went to Parkersburg for the purpose, as affiant then was informed and understood, of avowing the authority of said Flesher, and, the provision therein relating to said Claypool being stricken out, the stipulation in other respects was left in force.

That affiant prior to the time before mentioned had never seen said Hatfield or Rutherford to know them, and never after had any conversation with either of them upon said subject or any other business matter.

That affiant has read the affidavits of A. M. Toler and J. M. Toler filed in this cause, and the statement therein that they or either of them saw this affiant and M. F. Stiles riding up and down Ben creek in 1896 and 1897 or at the house of said Hatfield cannot be true, for this affiant during most or all of January, 1896, was at Parkersburg, and about the last of January or first of February, 1896, returned home to New York, and was not again in the State of West Virginia until about July or August of the present year, except for three or four days in September, 1897, at which time he was not in Mingo county nor within many miles of Ben creek, and has never been on said creek since; and affiant had not in 1895 to 1901 and has not now any personal knowledge concerning the location or possession of the several tracts claimed by said Hatfield or Rutherford.

That affiant has seen a copy of the written stipulation, which copy he is informed will be filed in said Supreme Court, and to the best of his knowledge, memory, and belief it is a true copy of the stipulation hereinbefore mentioned and a correct statement of the agreement aforesaid.

And further affiant saith not.

V. A. WILDER.

Subscribed and sworn to before me this 20th day of November, 1901, in my county aforesaid, as witness my hand and notarial seal.

R. S. SPILLMAN,
Notary Public in and for said County
[SEAL.] *of Kanawha, W. Va.*

Affidavit of E. L. Buttrick.

STATE OF WEST VIRGINIA, }
County of Kanawha, } *ss:*

Edwin L. Buttrick, being duly sworn, doth say:

That he is one of the persons whose name is subscribed as counsel to the bill in the cause of Henry C. King *vs.* S. D. Hatfield *et als.*, formerly pending in the circuit court of the United States for the district of West Virginia.

That he is seventy-six years old and for thirty years last past has been a resident of West Virginia and a practitioner in the Federal and other courts in said State during that time.

That he has long been acquainted with the title and all proceedings relative to the Robert Morris 500,000-acre grant; that he read said bill before the same was filed, and that all the allegations or averments are true, except such as relate to the claim of title of the defendants, as to which he had no personal knowledge, but the allegations concerning the same he believes, upon information regarded as reliable, to be true.

That he has been associated in a number of cases with Maynard F. Stiles during the past eight years, and that said suit was to the best and utmost of affiant's belief instituted in the ordinary course of business and without any collusive co-operation of any person or for any improper or unusual purpose.

That said cause was regularly on the docket of said court

and was regularly called as all other cases when reached, and this affiant was in court at the time the demurrer to said bill was overruled in May, 1900, the announcement of said ruling being made in open court upon the call of the docket, in the presence of a large number of the bar, and affiant distinctly remembers that some member of the bar commented to the court upon said cause and the court's ruling thereon.

That affiant has occupied the same offices with said Maynard F. Stiles for five or six years past, and has never had the file of papers or any papers belonging to the court in the case of King *vs.* Altizer *et als.* in said office or out of court, and to the best of affiant's observation, knowledge, and belief the said papers have never been in the office of affiant and said Stiles, and affiant has no knowledge concerning their whereabouts.

EDWIN L. BUTTRICK.

Subscribed and sworn to before me this 29th day of November, 1901. Witness my hand and official seal.

H. McC. ANDERSON,

[SEAL.] *Notary Public.*

EXHIBIT No. 1 WITH AFFIDAVIT OF MAYNARD F. STILES.

At a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg, in said district, on the 15th day of October, 1895, the following order was made and entered of record, to wit:

HENRY C. KING
vs.
S. S. ALTIZER ET AL.

In ejectment.

This day came James H. Ferguson, Esquire, and withdrew as counsel from the defense in this cause as to the defendants Sarah G. Hatfield and Nancy Rutherford.

Thereupon, the venire drawn for service as jurors at this term being diminished by disabilities and excuses given to the court to twelve persons, it was ordered by the court that the marshal of this district shall return jurymen from the bystanders sufficient to complete the panel, to appear here tomorrow morning at 10 o'clock.

I, L. B. Dellicker, clerk of the circuit court of the United States for the northern district of West Virginia, hereby certify that the foregoing is a true copy of an order entered of record in the circuit court of the United States for the district of West Virginia on the 15th day of October, 1895, in the ejectment case of Henry C. King *vs.* S. S. Altizer *et al.*, then therein pending.

Given under my hand and seal of said court, at Parkersburg, in said district, this 15th day of November, 1901.

[SEAL.]

L. B. DELLICKER,
Clerk C. C. U. S., N. D. W. Va.

EXHIBIT No. 2 WITH AFFIDAVIT OF MAYNARD F. STILES.

At a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg, in said district, on the 3rd day of July, 1895, the following order was made and entered of record, to wit:

HENRY C. KING
vs.
SIMON ALTIZER ET AL.

In ejectment.

Upon motion of the plaintiff's attorney in this action, this cause is set down for hearing, as to M. B. Mullins, Alexander McClintock, J. W. Stafford, Alexander Stafford, King Hiram Blankenship, Sarah G. Hatfield, Nancy C. Rutherford, and William Claypool, on the 5th day of September, 1895, at the United States court-room in Parkersburg, West Virginia; the trial at that time is to be had between the plaintiff and these defendants, and none others, parties to this cause.

And it is ordered that upon the question of forfeiture, which the court is advised will be raised in this cause, counsel file briefs on or before the 15th day of August next, counsel exchanging with each other copies of their briefs before the same is filed.

But the stipulation entered into on June 15th, 1895, between Maynard F. Stiles and H. K. Shumate, attorneys for H. C. King, plaintiff, and Sarah D. Hatfield, Nancy Rutherford, and Wm. Claypool, by Henry C. Flesher, their attorney, is not in anywise to prejudice or affect the rights of any of the other parties to this cause.

I, L. B. Dellicker, clerk of the circuit court of the United States for the northern district of West Virginia, hereby certify that the foregoing is a true copy of an order entered of record in the circuit court of the United States for the district of West Virginia on the 3rd day of July, 1895, in the ejectment case of Henry C. King *vs.* Simon Altizer *et al.*, then therein pending.

Given under my hand and seal of said court, at Parkersburg, in said district, this 15th day of November, 1901.

[SEAL.] L. B. DELLICKER,
Clerk C. C. U. S., N. D. W. Va.

EXHIBIT No. 3 WITH AFFIDAVIT OF MAYNARD F. STILES.

(Supreme Court of Appeals of West Virginia, December 8, 1900.)

STATE
vs.
STILES.

Writ of error—Disbarment of attorney—Evidence.

1. Where a judgment is rendered by a circuit court disbarring one of the attorneys practicing before it for alleged malpractice in disregarding a stipulation with opposing counsel as to the continuance of a case, this court has jurisdiction by writ of error to such judgment.
2. The evidence in such proceeding to disbar an attorney must support the charges, and be clear and preponderating.
3. The power to disbar an attorney is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility, but in doing so the court should exercise a sound and just judicial discretion.

(Syllabus by the court.)

Error to circuit court, Wyoming county—Joseph M. Sanders, judge.

Application for the disbarment of Maynard F. Stiles. From a judgment of disbarment Stiles brings error. Reversed.

E. L. Buttrick, for plaintiff in error; Edgar P. Rucker, attorney general; L. C. Anderson, and C. W. Campbell, for the State.

ENGLISH, *J.:*

A suit was pending in the circuit court of Wyoming county in the name of the State of West Virginia against Henry C. King and others for the purpose of selling 500,000

acres of land patented to Robert Morris by the Commonwealth of Virginia in June, 1795, for the benefit of the school fund. King presented a petition in said case, offering to pay the taxes that might be due thereon and praying that he might redeem the same from forfeiture, and was represented by Maynard F. Stiles as one of his counsel. Alexander McClintock also filed a petition in said case, claiming to be the owner of 142,000 acres, known as the "De Witt Clinton tract," patented by the Commonwealth of Virginia on the 19th of February, 1796, claimed in said petition to overlap the Morris grant, denying King's ownership of said 500,000-acre grant, and denying his right to redeem, in which petition he was represented by John A. Sheppard and others as his counsel. During the pendency of the suit King brought an action of ejectment against McClintock and others to recover said 500,000-acre grant, and on February 27, 1896, judgment was rendered against said King on the ground that his title had been forfeited for non-assessment of taxes thereon. From this judgment a writ of error was obtained to the Supreme Court of the United States. While said writ of error was pending in the Supreme Court, M. F. Stiles, representing H. C. King, and Sheppard, representing McClintock, entered into a stipulation for the continuance of said cause in the circuit court of Wyoming and before the commissioner until the cause of King against McClintock should be decided by the United States Supreme Court, which case was to be submitted on briefs within the first ninety days of the term of that court then in session; but if said court should require oral argument in addition to the briefs, and should not decide said case upon such submission, then said proceeding in the circuit court should not be continued after the refusal of the Supreme Court to decide the cause by reason of said stipulation. At the June term, 1898, of said circuit court John A. Sheppard presented his affidavit, charging Stiles with unprofessional conduct, consisting of the violation of said stipulation in this, that in the absence of Sheppard and his client, and in violation of his duty as an attorney of that court, he dishonestly procured the circuit court of Wyoming to enter a decree substituting D. A. Robertson as commissioner in the room and instead of J. R. Robertson, to whom said chancery cause had been referred and with whom a copy of said stipulation had been filed by affiant, and corruptly procured

the said commissioner to proceed and take proof and make his report without notice to affiant or his client, and secretly took his proof, and corruptly and in disregard of his professional duty suppressed the evidence that had been taken before the first commissioner, and procured said commissioner to file his report under said decree of reference, wherein it was found that said King was entitled to redeem said tract of 500,000 acres of land. Affiant also stated his belief and charged that Stiles prepared said report or dictated its findings and procured one Shumate, a practicing attorney in said court, at the September term, 1897, to obtain a decree of redemption of said tract, and that Shumate, at the instance and request of Stiles, procured the entry of a decree permitting Henry C. King to pay to the commissioner of school lands of said county a small sum of money, adjudging that by the payment aforesaid he had redeemed the same. Affiant further stated that Stiles and Shumate, who were associated as counsel in the case, had frequent opportunity of giving him notice of their action and intended action in the case, but refrained from so doing, and when Shumate moved the court to enter said decree of redemption for his client King, he represented to the court that there was no opposition to said redemption, and that no one was objecting or opposing the said decree, while he well knew there was objection by affiant on behalf of McClintock to any decree in favor of King. Upon the filing of this affidavit a summons was awarded against Stiles, requiring him to appear at the next general court and show cause, if any he could, why his name should not be stricken from the roll of practicing attorneys in that court and deprived of the privilege of practicing his profession in that court. At a subsequent term of the court said Stiles appeared and moved to quash the rule awarded against him for several reasons assigned. He also filed his answer to said rule, denying every material allegation contained in said affidavit, and interposed a demurrer to said rule. The court overruled said demurrer and motion to quash and proceeded to hear testimony, and on March 30, 1899, entered an order holding that Stiles had conducted himself in a manner unworthy of a reputable attorney, and had abused his privileges as an enrolled member of the bar of that court, and ordered that his name be stricken from the roll of attorneys practicing at the bar

of that court, and directed that he be prohibited from further exercising his office of attorney-at-law in that court. From this judgment Stiles obtained this writ of error.

Counsel for the State in their brief raise a question of jurisdiction, and claim that the writ of error was not the proper remedy. In considering this question, we ask, first, what was the character of the accusation against Stiles in pursuance of which the penalty was inflicted? The only response can be that it was malpractice, consisting in the violation of said stipulation. The fact that the penalty imposed was a severe one is apparent when we take into consideration the privilege conferred by defendant's license to practice in all the courts of the State, which is acquired only after obtaining a certificate of good moral character, and when we consider, further, that striking from the roll of attorneys in one county to that extent deprives him of his license and degrades him in the ranks of an honorable profession. In Fisher's case, 6 Leigh, 619, it was held that, by the provisions of the statute (1 Rev. Code, c. 76, 6), a court cannot, for malpractice of an attorney or counselor, committed in its presence, suspend the license of the party offending, in a summary way, but must direct an information to be filed against him and inflict the punishment on a verdict of guilty found in such information. In that case Chapman Johnson, attorney for Fisher, first applied to the court of appeals for a supersedeas to the order, which was refused. He then applied to the general court, and the writ of error was allowed, jurisdiction taken of the case, and a decision rendered, in which the court recognizes its own power, independent of any statutory restriction, in a proper case to suspend or annul the license of an attorney, so far as it authorizes him to practice in the particular court which pronounces the sentence, but no further, and concludes by holding that before such a judgment as that pronounced by the court below could be given, the party accused must be regularly prosecuted, by information or indictment, and found guilty by a jury. Again, in State *vs.* McClaugherty (W. Va.), 10 S. E., 407, which was a proceeding for contempt of court, consisting in the publication of an article reflecting upon the circuit court of Mercer county, a writ of error was awarded, and this court took jurisdiction of the case and passed upon the question involved. Snyder, J., speaking

for the court, quotes with approval from the opinion rendered in the case of Rice *vs.* Com., 18 B. Mon., 484: "The power to remove an attorney from the bar ought to be exercised with great caution and discretion, but it is a power incidental to all courts, and, unless it be clearly exceeded or abused by a circuit court, this court should not interpose, as it cannot decide with the same means of information that the court below was in possession of;" citing *Ex parte* Burr, 9 Wheat., 530; 6 L. Ed., 152, in which case the opinion was written by Chief Justice Marshall, and the first point of the syllabus suggests a query "as to the authority of said court to interfere by mandamus in the case of the removal or suspension of an attorney of the district and circuit courts." In *Ex parte* Secombe, 19 How., 9; 15 L. Ed., 565, the court says: "It has been well settled by the rules and practice of the common-law courts that it rests exclusively with the court to determine who is qualified to become one of its officers, as attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself." The court, having the right to use its sound judicial discretion in determining such matters, cannot be controlled in the exercise of its discretion by mandamus. (See Board *vs.* Minturn, 4 W. Va., 300.) That this court has jurisdiction of a writ of error to a judgment disbarring an attorney, see the case of State *vs.* Shumate (recently decided), 37 S. E., 618.

As to the merits of the case, can we say the charges upon which the plaintiff in error was disbarred were sustained by the testimony? He was charged with having obtained an order at the March term, 1897, substituting D. A. Robertson as school commissioner in place of his brother, J. R. Robertson, but Colonel Childers testifies that he wrote the order making the change at the request of J. R. Robertson, and was representing the State, having filed a bill in the case, and in presenting the order substituting the said commissioner had no suggestion from Stiles or communication with him about it; and the evidence shows that Stiles

was not in court during the term, but that C. M. Turley, one of the counsel for McClintock, was present and made no objection to the order It is charged that the plaintiff in error, at the September term, 1897, requested H. K. Shumate to procure the making and entering of the decree permitting said King to redeem said 500,000 acres of land by the payment of a small sum of money; yet the testimony shows that the papers were presented and the decree of redemption asked for by Colonel Childers, who prepared the bill and represented the school commissioner, and it is also shown by the testimony and the certificate of the court that Stiles was not present at that term of court. M. F. Stiles is charged with suppressing the testimony taken before J. R. Robertson, but he shows in his testimony that such was not the fact, and no proof was taken to sustain the allegation. It is also shown by the testimony that after the new commissioner was appointed, and had given notice by publication that the school commissioner was proceeding to take testimony, and a witness named Sell had been introduced before the commissioner by the State, Stiles appeared and cross-examined him, and perhaps offered some documentary evidence. It further appears that the decree of redemption was entered by consent of counsel representing the school commissioner, and Wilder and Shumate, attorneys, representing King; so that, in my opinion, the charges are not sustained by a preponderance of the evidence, as they should be, in accordance with the rule laid down in Walker *vs.* State, 4 W. Va., 749. The judgment complained of is reversed.

EXHIBIT NO. 4 WITH AFFIDAVIT OF MAYNARD F. STILES.

STATE OF WEST VIRGINIA:

At a special term of the supreme court of appeals, continued and held in Charleston, county of Kanawha, on the 8th day of December, 1900:

STATE OF WEST VIRGINIA, *Plaintiff Below, Defendant in Error,*
vs.
MAYNARD F. STILES, *Defendant Below, Plaintiff in Error.*

Upon a writ of error and supersedeas to a judgment of the circuit court of Wyoming county rendered on the 30th day of March, 1899.

The court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is error in said judgment.

It is therefore considered that the finding and judgment of the circuit court of Wyoming county, made and rendered in this case on the 30th day of March, 1899, be, and the same is hereby, set aside, reversed, and annulled.

And this court, proceeding to make and render such finding and judgment in this case as the circuit court of Wyoming county should have made and rendered, doth now find the defendant not guilty of the charges specified in the affidavit of John A. Sheppard, mentioned in the rule awarded by said circuit court against the defendant to show cause why he should not be disbarred as an attorney practicing in said circuit court. It is therefore considered that said rule be, and the same is hereby, discharged; which is ordered to be certified to the circuit court of Wyoming county.

The decision of points in the foregoing case, as appears from the syllabus and written opinion prepared by Judge English, was concurred in by Judges McWhorter, Brannon, and Dent.

(A true copy from the record.)

Attest:

[SEAL.] J. A. HOLLEY, *Clerk.*

EXHIBIT No. 5 WITH AFFIDAVIT OF MAYNARD F. STILES.

STATE OF WEST VIRGINIA:

At a circuit court continued and held for the county of Logan, at the court-house thereof, on Wednesday, the 26th day of October, A. D. 1898.

Hon. E. S. Doolittle, judge, presiding.

THE STATE
vs.
MAYNARD F. STILES.

Upon a rule for contempt.

This day came The State, by her attorney, as well as the defendant, Maynard F. Stiles, in his own person, and also by attorney.

And thereupon the defendant moved the court to quash the rule awarded against him, and in support of said motion tendered his answer to said rule; which motion, being argued and considered, is overruled.

And thereupon the defendant tendered and, by leave of court, filed his answer to said rule, and issue is joined thereon; and thereupon all matters of law and fact were submitted to the court, who, after hearing the evidence and arguments of counsel, is of opinion, and so finds, that the defendant, Maynard F. Stiles, was and is guilty of *the* contempt of this court in obstructing its lawful process and decree, as charged in said rule, in preparing, swearing to, and causing to be filed a bill in equity in the name of Henry C. King in the circuit court of the United States for the district of West Virginia, and in obtaining thereon an order from said court enjoining and restraining Joseph W. Hindman, commissioner of school lands of this county, from selling certain lands which this court had decreed to be sold and had appointed the said Joseph W. Hindman, commissioner, as aforesaid, to advertise and sell same in accordance with said decree, and in causing a copy of said order to be served upon the said Joseph W. Hindman, commissioner aforesaid.

It is therefore considered by the court that the said Maynard F. Stiles, for his contempt aforesaid, be, and he is hereby, committed to the jail of this county, and there to be confined until the said bill filed, as aforesaid, in the circuit court of the United States be dismissed of record and the in-

junction awarded thereon wholly dissolved and the payment of the costs hereinafter adjudged against him; to which ruling and judgment of the court the defendant excepts.

It is further considered that the State recover from the said Maynard F. Stiles her costs in this behalf expended, including ten dollars ($10.00) allowed by statute.

A copy from the original order.
Teste: T. C. WHITED, *C. Clerk.*

Endorsed: "Exhibit No. 5."

UNITED STATES OF AMERICA }
Southern District of West Virginia, } *ss:*

I, Edwin M. Keatley, clerk of the circuit court of the United States for the southern district of West Virginia, do certify that the foregoing is a true copy of Exhibit No. 5 filed with the petition of Maynard F. Stiles in the proceeding *Ex parte* Stiles and now of record in my office.

In testimony whereof I hereto set my hand and the seal of said court, at Charleston, in said district, this 23d day of November, A. D. 1901, and in the 126th year of the Independence of the United States of America.

[SEAL.] EDWIN M. KEATLEY,
Clerk C. C. U. S., S. D. W. Va.

EXHIBIT No. 6 WITH AFFIDAVIT OF MAYNARD F. STILES.

At a circuit court of the United States for the district of West Virginia, continued and held in the city of Charleston, in said district, on Saturday, January 14th, A. D. 1899, among others, the following proceedings were had:

Ex Parte STILES.

The body of the said Maynard F. Stiles being brought before the court pursuant to the writ of *habeas corpus* heretofore awarded herein, and the return to said writ having been considered, and the said cause having been argued by counsel, and it appearing to the court that the facts and circumstances and matters therein set forth are not sufficient to justify the imprisonment of the said Stiles, and no sufficient

cause for his detention appearing, it is by the court *ordered* that the said Maynard F. Stiles be by the said sheriff and jailer forthwith discharged from imprisonment.

UNITED STATES OF AMERICA,
Southern District of West Virginia, } *ss:*

I, Edwin M. Keatley, clerk of the circuit court of the United States for the southern district of West Virginia, do certify that the foregoing is a true copy of an order entered in the proceeding *Ex parte* Maynard F. Stiles and now of record in my office.

In testimony whereof I hereto set my hand and the seal of said court, at Charleston, in said district, this 23d day of November, A. D. 1901, and in the 126th year of the Independence of the United States of America.

[SEAL.]

EDWIN M. KEATLEY,
Clerk C. C. U. S., S. D. W. Va.

EXHIBIT No. 7 WITH AFFIDAVIT OF MAYNARD F. STILES.

UNITED STATES OF AMERICA,
Southern District of West Virginia, } *ss:*

I, Edwin M. Keatley, clerk of the circuit court of the United States for the southern district of West Virginia, and as such clerk custodian of the records of the circuit court of the United States for the district of West Virginia, previously sitting at Charleston, do certify that I have examined the trial dockets on file in my office and find that at the spring term, 1899, the case of Henry C. King *vs.* S. D. Hatfield *et al.*, No. 363, in equity, is regularly entered on the clerk's copy in lead pencil, apparently in handwriting of the clerk, and that the said case is not on the judge's copy of said docket; and I do further certify that the said cause is regularly on both the clerk's and judge's copies of the trial dockets for the fall term, 1899, spring term, 1900, and fall term, 1900.

In testimony whereof I hereto set my hand and the seal of said court, at Charleston, in said district, this 23d day of November, A. D. 1901, and in the 126th year of the Independence of the United States of America.

[SEAL.]

EDWIN M. KEATLEY,
Clerk C. C. U. S., S. D. W. Va.

IN THE SUPREME COURT OF THE UNITED STATES.

S. D. HATFIELD ET AL., *Appellants*,
vs.
HENRY C. KING, *Appellee*.

On petition of State of West Virginia and others to intervene.

Now comes Henry C. Flesher and, in opposition to the motions of the State of West Virginia and of Stuart Wood and of other persons who have presented petitions herein, tenders his affidavit and exhibits thereto and prays that said petitions and motions and each of them be dismissed—

Because no ground exists for the action requested against him, the said Henry C. Flesher, or for the annulment of the decree appealed from in the manner proposed by said petitions, but only for reversal thereof for the errors specified in the assignment of errors accompanying the petit on for appeal.

HENRY C. FLESHER.

STATE OF WEST VIRGINIA:

Henry C. Flesher, being first duly sworn, doth depose as follows:

Some time about May, 1895, H. K. Shumate, a lawyer, then living at Logan, West Virginia, and who was one of the attorneys of Henry C. King in an action of ejectment against a number of persons living in Logan and McDowell counties and elsewhere, came to me or met me and told me that some of said defendants, Mrs. Hatfield, Mrs. Rutherford, and William Claypool, who had been clients of his in other cases, wanted to be referred to some lawyer who would look after their defense, and that he had recommended me, and they had directed him to ask me to appear for them. This I was willing to do. He also told me that he had made an agreement with them relative to the trial

of the cause as to them. Some time later, while on the way from Matewan to Elkhorn, where I then lived, I met Mrs. Hatfield, who was on the train when I entered, and told her what Mr. Shumate had said to me about the King suit, and she said she had told him to speak to me about the matter, and said she would like to have me represent her and her daughter, Mrs. Rutherford, who was then living with her. We discussed the case, and I verified what Shumate had told me. Some time thereafter she sent me the papers relating to her and Mrs. Rutherford's lands and to the case, and these papers remained in my possession until long after the institution of the present suit and some time in 1899, when I returned the title papers to her for the purpose of conveyance or contract relating to her land.

The stipulation that was signed by me on behalf of the said Hatfield, Rutherford, and Claypool was, in my judgment, very advantageous to them, as they admitted thereby nothing with reference to the plaintiff's title or case that was not well known, easy of proof by him, and that has not since been often established, while admissions were made by the plaintiff that, while true and susceptible of proof, required time and labor and expense to produce the necessary evidence, while not only were they relieved of proof of title to certain lands, but were released as to those lands. I regarded and still believe the advantages of the arrangement to be distinctly with my clients. A copy of said stipulation, the typewritten portion of which is, to the best of my knowledge and recollection, a carbon copy of all of the original that was in typewriting, and with additions, interlineations, erasures, and alterations corresponding to those made in the original and made at or about the same time, except the striking out of the Claypool part, and which copy I retained at the time of signing the original, is hereto attached and marked "Stipulation." The signatures were not attached to this copy, but instead thereof I

made a note of same. M. F. Stiles was not present and I had had no communication with him upon the subject.

At the time of signing said stipulation I had had no direct instruction from said Claypool upon the subject, although I expected to have in proper time, but fully believed then, as I do now, that he had directed said Shumate to request me to represent him, as stated by Shumate, having found that to be the case with the other parties and having entire confidence in the statement of said Shumate, whom I knew well.

About the time the rule was awarded that is exhibited on page 95 of the petitions and exhibits in this case, a lawyer from Welch, returning from Parkersburg, told me that my authority to represent some of the parties in the case had been disputed by some other persons, and that Judge Jackson had declared that he knew me and had confidence in my integrity, or something to that effect, but that they could have the rule if they wanted it. No rule was ever served on me, and the first knowledge that I ever had that any was in fact ever awarded was when I saw the printed copy above mentioned. Some time afterwards Mrs. Hatfield told me that she and Mrs. Rutherford had been at Parkersburg on the same matter. She also told me that M. B. Mullins (whose affidavit is referred to in said rule) and C. M. Turley had come to her house one morning, after having been overtaken on the way by darkness and rain and forced to camp over night on the mountain in the rain, and sought to persuade her and Mrs. Rutherford to repudiate the stipulation and me as their counsel, which they refused to do.

The stipulation aforesaid was not made for any purpose of imposing upon the court or upon any one else, nor did it nor could it do so, but for the purpose of a speedy adjudication by the court of actual controversies and for the decision of questions that must be decided before any conclusion could be reached, and the court took the case with full understanding of the agreement and of the position of the par-

ties and counsel. Before the court acted upon the matter the time for trial as to Mullins and McClintock, who were not parties to the stipulation, arrived, and the case was continued as to all other defendants, and the matter remained in abeyance.

Of my absolute authority to represent the said Hatfield and Rutherford in the King litigation I had and have no more doubt than that the plan of trial agreed upon was advantageous to them.

Considerable time after the filing of the bill in the present case, M. F. Stiles, one of the attorneys for the complainant therein, meeting me on the street at Welch, told me he had filed the same, stating the general nature of it, and asked whether I would accept service or waive process for the defendants and avoid the cost of sending a marshal more than two hundred miles to make service. I told him to send me a copy of his bill when he got home, and I would see what to do. Soon after he sent me a copy.

I examined the bill carefully. It appeared to follow closely along the line of the previous stipulation as to all matters of fact relating to the situation of the King title, with which I was familiar, and to state the situation of defendants fairly. I discovered no ground of demurrer, except the one stated in my demurrer, nor do I perceive any yet. If the legal contention of the plaintiff as to the invalidity of the State constitution was unsound, he had no case. I therefore framed the demurrer to what appeared to me the vital point and one defect in the case, and at the next term of court at Charleston presented it in person in court, having that day notified said Stiles, whose office was opposite the court-house, that I would do so, and the demurrer was by order made in open court set down for argument, and after a brief oral discussion was submitted, the court being supplied with copies of all the briefs that had been filed by all the counsel in the case of King *vs.* Mullins in this court. The court took the case

under advisement, and after several months overruled the demurrer. The court did not at that time deliver any written opinion, but stated or intimated that he had intended to do so. I told him I wished he would do so; I wanted to see his reasons in full.

Two defenses remained that could be presented by answer, viz., title by prescription, and the question of boundary of the plaintiff's grant, neither of which I believed could be maintained. I had canvassed the question of possession at the time it was expected to go to trial under the stipulation, and was satisfied it could not be established as to any land that the plaintiff did not by the stipulation agree to release. One object of the agreement of plaintiff to dismiss was to avoid any question of adverse possession. In objection to the location of the plaintiff's grant as set out in the bill and in the decree of the Wyoming court, I had no faith; that question, as well as all questions relating to the plaintiff's title, except the one of forfeiture, had not long before been tried in the United States circuit court for the Western district of Virginia, in a trial lasting several weeks, and defended by a corps of able lawyers backed by the resources of a wealthy timber corporation, and the plaintiff had prevailed upon every material point and had recovered a verdict and judgment, the learned and experienced judge, the late John Paul, taking from the jury the question of location by a specific direction on the concurrent evidence for plaintiff and defendants to find the boundaries according to the plaintiff's contention. (See King *vs.* Watkins, 98 Fed., 913.) To stand upon the provisions of the State constitution, which, if valid, constituted a perfect defense, was, in my judgment, the proper course to take, and I did not avoid the responsibility. I do not see how I am justly subject to criticism by counsel who insist that those provisions are valid.

After the decision of the case there was nothing to do but do nothing or appeal. I wrote Mrs. Hatfield the result, and

that I would appeal, and did so. Somewhat later, at my request, she came to see me and fully approved my course in the case. Her approval and attitude will appear from a letter received from her some time after and hereto attached marked "Hatfield letter."

I took the appeal on my own judgment and in the interest of the appellants, although, as counsel for the commissioner of school lands of McDowell county I was otherwise interested in a reversal. I had no agreement with counsel for King except for submission, which appears of record.

At the time the suit was brought and I appeared to it I still had the papers of Mrs. Hatfield and Mrs. Rutherford, as I supposed her name still to be, not having heard about her second marriage, and no suggestion of any revocation of my authority had been made by or on behalf of either of them. Mrs. Rutherford had sanctioned and ratified the action of Mrs. Hatfield in employing me to represent her in the first place, and I had no doubt about my continued authority to act for them.

I was never the attorney, counsel, or agent of Henry C. King in any case or in any matter, and was never employed or paid by him or by any one for him to appear for the said defendants or for any other person, or to perform any service for him or for any one else at any time or place.

I had no communication with M. F. Stiles or any one representing King about the present case prior to the time when said Stiles informed me he had brought this suit. I had nothing to do with the bringing of the suit and no knowledge or intimation prior to that time that such a suit was contemplated, and I was not "procured" by him to appear thereto. I had no purpose or expectation of procuring from the court any opinion or ruling, except as the questions at issue demanded a ruling, which I could not control or forecast, though I expected a favorable decision, and no thought and no act of mine had any reference to Stuart Wood, Arthur D. Bright, or any of the other persons who

ask to intervene in this suit. The most of them I had never heard of, and had no sentiment for or against any of them; and any statement, wherever made, that I entered into any collusion with any person, or sought to impose upon the court, for which, and the distinguished judge who heard the case, I have the greatest reverence, or had any improper purpose or motive, or that the case was, so far as I was or am concerned, fictitious or manufactured or in any way unreal, is without any basis of fact or truth whatever, as is the suggestion that any secrecy or mystery existed concerning the case; and I am moved to wonder how the persons referred to are to be affected, if, as they contend, the facts in their cases or the cases they expect to have are wholly different. I knew nothing of their situation and know nothing of it now.

About the incident mentioned in the affidavit of S. U. G. Rhodes I have this to say: Some time about the middle of October he came to me, and said he had been sent by Mrs. Browning, and showed me a letter purporting to be written by her to said Rhodes. I did not recognize the name nor connect her with Mrs. Rutherford, and said I had never appeared for her. This statement I corrected when he told me who she was. The manner of Mr. Rhodes and the criticism of my management of the case, with which he opened the interview, were not pleasant. They suggested the effort made by Mr. Sheppard to force himself and his associates upon my clients instead of coming to me, which Mrs. Hatfield had reported to me some months before and which she had repelled. I resented his manner and made no effort to extend the conversation, but told him that if he had been employed in the case and knew better how to manage it and thought he could win it, to go ahead. I did not tell him that "they will both be taken care of, regardless of how the case is decided in the Supreme Court," but I did say that their rights would be taken care of without reference to him, or something to that effect.

Counsel have seen fit to refer to the suspension of my license by the circuit court for Jackson county, West Virginia. The facts concerning the matter should also be told. There was a dispute between myself and Thompson & Jackson over the alleged indebtedness, and they brought suit. At the time and for some two years previously I was living in McDowell county, between three and four hundred miles distant by rail, the Norfolk and Western road not having been completed. I returned to defend the suit and had got to Ripley Landing, within thirteen miles of the court-house, when I learned that judgment had been entered by default, and the court, after a session of three or four days, had adjourned. Subsequently I paid the judgment, although excessive.

I am sixty-six years old and was born and have lived all my life in West Virginia, and it is a matter of no small pride that, with all the investigation to which my life and character seem to have been subjected, only the incident referred to appears to have been deemed to my disadvantage or detraction.

In enlargement of the foregoing I wish to repel and deny every charge and suggestion of collusion, imposition, misconduct, improper purpose or motive, or professional or other impropriety of any kind in connection with the matters herein mentioned in either court, and to declare my great respect for the court and my understanding of my professional obligations.

HENRY C. FLESHER.

Subscribed and sworn to before me. Attest my hand and the seal of the supreme court of appeals of West Virginia this 23d day of November, 1901.

[SEAL.]

D. C. REAY,
Deputy Clerk.

Hatfield Letter.

WHARNCLIFF, W. VA.,
MINGO CO.,
Feb. 27th, 1901.

MR. HENRY FLESHER SIR.

I wright you a few lines To let you heare from mingo Co. I went to williamson the evening I left welch. Mr. Shepard wanted me to let Him & others to be my Attorney, I told him I Had alwayer to tend to my Buisness, he wonted to write to you that I wanted you to take another lawyer to Help you I told him no I would wright to you myself & if you wanted another lawyer it would be all rite with me. if you want one you be your own judge about the matter. he said that my attorney had let my land sell & and it would Be hard to get it Back again I told him I had bin sold out so often it did not go anys hard with me. tha ask if i was aquainted with Mr Ieagar. I was how long along time Dr Ieagar uste to be our family doctor when he practed medicine. then tha ask who went on my bond I told them. tha are on a hi string you had better wright to me when you wright on envelop that got no Return on it just Back it to wharncliff.

have Mr Ieagar to settle the cost of my suit & send me a receipt I want to be ready for all that comes around.

So, I close Yours Truly

S. D. HATFIELD.

"Stipulation."

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

HENRY C. KING, *Plaintiff*,
vs.
SIMON S. ALTIZER ET ALS., *Defendants*.

For the purpose of a convenient presentation of the controversies between plaintiff and defendants Sarah D. Hatfield and Nancy C. Rutherford, who for the purpose of trial sever from their codefendants in the above-entitled action, plaintiff and said defendants, by their respective attorneys, stipulate and agree as follows:

That the Commonwealth of Virginia granted to Robert Morris the tract of land mentioned in the declaration in this action, as therein stated, and that afterwards the said land, by sundry acts of legislature, decrees of courts, and conveyances, became vested in one Robert E. Randall, trustee, appointed by the courts of Virginia and West Virginia, successor to John Peter Dumas, trustee, for the creditors of James Swan, deceased, appointed by act of legislature of Virginia of March 15, 1838, and subject to such rights as the State of West Virginia acquired therein, if any, by failure of said Randall to pay taxes thereon levied by said State, and subject to such rights, if any, as these defendants had therein, was so vested in said Randall, trustee, on the 10th day of April, 1883.

That on said day, in a proceeding pending in the circuit court of said State for the county of Wyoming, wherein a part of said land lies, instituted by the commissioner of school lands against said land and the owners and claimants thereof, to sell same for the benefit of the school fund of said State, as forfeited and delinquent land, upon the petition of said Randall filed therein and upon the payment by him of

the sum of $8,000, which was adjudged to be the amount of taxes, interest, costs, and damages due to said State upon said land, a decree was duly entered adjudging said Randall, trustee, to be the owner of said land and releasing and discharging the same from all taxes, forfeitures, and claims of said State up to and including the said year 1883, reserving to said defendants all rights secured to them under the constitution and laws of said State.

That said decree directed the clerk of said court to certify a copy of said decree to the auditor, and also to "certify, under the direction of said Randall or his attorney, a copy of this order to the assessor of the proper assessment districts for taxation."

That said $8,000 was duly paid by said Randall, trustee, and proper settlement and distribution of same between the several counties wherein said land lies was made.

That it does not appear from said books that said land was thereafter placed upon the land books of said counties for taxation or since said decree been charged with taxes; but the omission of said land from the assessor's books has not been reported to the auditor of said State, nor has any report concerning such omission been made by or to any officer whatever, and no report of record concerning same exists or has anywhere or at any time been made, as required by statute or otherwise, since the entering of said decree of April 10, 1883.

That plaintiff is now and at the time of filing said declaration was vested with all the estate vested in said Randall, trustee, on said tenth day of April, 1883, or immediately after the exoneration of said land from taxes by said decree, as aforesaid, except so far as his title and estate may be affected by any non-entry of said land upon the assessor's books, as aforesaid, and except so far as these defendants have right or title to portions of said land adversely to plaintiff by grant from the State and by adverse possession thereunder.

Said defendants contend that, by reason of the aforesaid non-entry of plaintiff's said tract of land upon the assessor's books, said tract of land is forfeited to and is absolutely vested in the State of West Virginia, and that plaintiff cannot maintain his action of ejectment thereon, and for the purposes of determining said question, and for no other purpose, said defendants admit that they have entered upon and withhold said land from plaintiff.

Plaintiff contends that notwithstanding said non-entry of said lands the same are not forfeited to said State, and that he is entitled to maintain his said action against said defendants.

And the said parties agree that the issue above raised shall be argued and submitted by them to this said court, at Parkersburg, at the approaching June term thereof, upon such day, not earlier than the 25th day of June, as the court will entertain the same.

If the said court shall hold that plaintiff may maintain said action of ejectment, then said defendants deny that they unlawfully withhold any portion of said land from plaintiff; deny that the lands claimed by said defendants are within the said tract of land claimed by plaintiff, and stand upon their pleas of "not guilty" heretofore entered is said action, and said action shall then be set down for trial as soon after the determination of the right of plaintiff to maintain same as the court will hear the same, and shall be then tried; provided said trial be not earlier than the 25th day of June, 1895.

And it is further stipulated that if the tracts of land hereinafter mentioned or any of them shall be found to lie within the boundaries of the said tract of land mentioned in the declaration in this action, then it is agreed by plaintiff that for the said tract said action shall be dismissed as to them.

The tracts of land to which the last above clause applies are the following, viz:

For Sarah D. Hatfield and Nancy C. Rutherford, the surface right of a patent of 390 acres patented to Ali Hatfield and others, and of 450 acres patented to Ali Hatfield; one of 66 acres, also patented to Ali Hatfield; the lower part of a patent of 79 acres, patented to T. E. and J. R. Browning; the upper part of a patent of 46 acres, patented to Ali Hatfield, and the western half of a patent of 420 acres, patented to William Mullins, all adjoining each other on the left-hand fork of Ben creek, in Mingo county, State of West Virginia upon which the said Sarah D. Hatfield now resides.

For Wm. Claypool, the upper half of a patent of 500 acres patented to William Ward, and two smaller patents patented to said William Claypool, adjoining the same above on Big Huff creek, in Logan county, State of West Virginia, where the said Claypool now resides.

(Last paragraph scratched out with pencil.—PRINTER.)

JUNE 15, 1895.

Signed by H. K.
SHUMATE, *Att'y*
for H. C. King.

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Brf. of Stiles for Appellee

Submitted

Filed May 9, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 231.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

v.

HENRY C. KING, APPELLEE.

NOTE IN OPPOSITION TO APPELLANTS' MOTION TO AMEND ORDER OF REMAND.

MAYNARD F. STILES.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1901

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

Note in Opposition to Appellants' Motion to Amend Order of Remand.

I.

By the act of Congress of January 22, 1901, the judicial district of West Virginia was divided into two districts—the northern and the southern—with provision that causes and proceedings *then pending* in the courts of the district of West Virginia as constituted before the passage of the act, of which, if they had been brought after the act, the courts of the southern district would have had jurisdiction, should be transferred to the southern district. All other causes, of course, fell to the northern district; and there was a further

provision the purpose and intention of which was that all cases and matters that were "in the breast" of the district judge of the district of West Virginia, the Honorable John J. Jackson, should be disposed of in the northern district and by him, without reference to the portion of the State in which such causes or proceedings originated.

Under this act it has been the practice of Judge Jackson to make proper distribution of causes pending at the time of the passage of the act, by suitable orders.

The act in terms applies only to "causes and proceedings * * * now pending in the courts of the judicial district of West Virginia"—that is, at the time of the passage of the act, and at that time the above-entitled cause was not pending in such court, but had previously been removed therefrom by appeal from a final decree and was pending in this court and was not within the operation of the act.

If this be looked upon as a narrow view, it is at least broad enough to sustain the order of this court remanding the cause to the northern district, where, if desired, such motion may be made upon the question of transfer as the party may be advised is proper. The cause could not properly be remanded elsewhere.

II.

But there were two distinct matters before this court. One was a motion to amend the decree and remand the cause for further proceedings; the other was an application of various persons for the disbarment or other punishment of counsel for alleged contempt. Entitling the papers upon which the latter application was based the same as the appeal was entitled did not make it any proper part of that case, which was a suit to quiet title; so far indeed as the motion against counsel for the appellee is concerned, was not made by either of the appellants, but by strangers to the case.

The act of Congress referred to has no possible application in any way to the motions and proceedings against counsel nor the disposition to be made of the same by any court. The circuit court of neither district ever had jurisdiction of them. They were never in any court of either district nor any other court but this. They were original applications to this court invoking its original and independent jurisdiction and action. They could be addressed only to this court or to the judge charged to have been imposed upon, who was the judge of the northern district of West Virginia at the time the charges were made.

This court could entertain the complaint or refer the matter to that judge, who, from his presumed acquaintance with the parties and the transaction before him, would be most suitable to inquire into the matter and most likely to arrive at a proper conclusion. This court, presumably upon those considerations, for they were the ones advanced upon the argument, saw fit to refer the charges to that judge. In this it exercised its discretion, and was not influenced and could not be controlled by the act in question. If the matter were to be sent to some other judge than the one before whom the alleged misconduct occurred, this court could as well send it to Texas, so far as the act mentioned is concerned.

The gentlemen do not object to the principle laid down by the court that the investigation should be had "before the judge who, if the charges are correct, has been imposed upon." They do not question its soundness as a precedent, but they object to its governing the case in which it is established. To gratify their purpose, this court must disregard consistency.

And why do the gentlemen object to the matter going before Judge Jackson? They affect to see something in his opinion or in the affidavit of Mr. Flesher "apparent to the discriminating reader," such as themselves, but obscure to this court and the rest of us. Their recently inflamed sense

of delicacy forbids them to state a reason, but they ask this court upon their mere nod and innuendo, and the suggestion that it is their desire to make an order that would necessarily in some unknown way, and for some undisclosed and undiscoverable reason, directly reflect upon the district judge, who has had a long and honorable career.

Whatever advantage or gratification it might afford the opponents of Mr. King, or some of the counsel who represent them, to distract the attention of Mr. King's counsel by a defensive personal fight under the most unfavorable conditions they can bring about, or to remove him altogether if possible, they have no vested rights in the matter. It is an affair that belongs to the court and not to them, and it is not deemed likely that this court will feel an interest in bringing about, without manifestly good reason, a situation that might require Judge Jackson to go into the witness-box concerning matters charged to be in contempt of him instead of sitting in judgment thereon.

There is another consideration that makes against the motion. The judge of the southern district of West Virginia, before whom it is proposed to send said cause and investigations, was at the time of his recent appointment, and for many years prior thereto, the law partner of Mr. Edgar P. Rucker, who has participated in the prosecution of the motions against the counsel of Mr. King, and the fact that the firm had been counsel in some of the "King cases" has heretofore led Judge Kellar to decline to act in cases in which Mr. King is a party; and whether disqualified or not to conduct the proposed investigation of the conduct of Mr. King's counsel, it is perceivable that to do so would at least be embarrassing. Some of the counsel upon this motion are fully cognizant of this situation.

The failure of this counsel to produce in this court certificates of his good character and conduct was occasion for the criticism of opposing counsel. Before Judge Jackson, before whom he has practiced constantly for nine years, he does not

hesitate to say that he believes such evidence will be unnecessary, and if in that time he has earned the good opinion of the court, this court will neither regret the fact nor begrudge any advantage he may have from it, however unfortunate it may seem to opposing counsel or parties.

It is respectfully submitted that the motion should be overruled.

MAYNARD F. STILES.

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Supreme Court of the United States

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WEST VIRGINIA.

Motion for a Rule against H. C. Flesher and to Dismiss the Appeal and also the Cause.

And now comes Nancy C. Browning, erroneously called in this record Nancy C. Rutherford, for the special purposes of this motion, and for no other purpose, and respectfully shows that she is aggrieved by the pendency in this court of the above-entitled cause, in which she is made to appear as one of the parties appellant, and by the unauthorized appearance for her by said Henry C. Flesher, both in this court and in the court below, and by the alleged final decree of the lower court.

She now avers that this appeal was taken without her authority, knowledge, or consent, and that the said Henry C. Flesher, who has assumed to appear for her as her attorney both in this court and in the court below, had no authority whatever to appear for or to represent her in either court; that she was not served with process to answer the bill in the court below, and had no knowledge, notice, or information whatever of the institution, pendency, or decision of said suit in the court below or of the unauthorized appearance for her by said Henry C. Flesher till some time after this court had made the order of the 21st day of January, 1901, setting aside the submission of this cause and directing oral argument therein; that the allegation in the bill that the said Henry C. King had actual possession of the lands described in said bill, and that neither she nor her mother, S. D. Hatfield, nor those under whom they hold said lands, had such actual possession, is absolutely false and untrue and known to be false by the said Maynard F. Stiles, the attorney for the said Henry C. King; and other allegations of said bill are false, fraudulent, and fictitious.

That she has other good and valid defenses to the alleged claim of title of the said Henry C. King.

That she has retained W. P. Hubbard, E. P. Rucker, C. W. Campbell, and John Sheppard as counsel to represent her and to protect her interest in the lands described in said bill.

She begs leave to file herewith as parts hereof the warrant of attorney to the said W. P. Hubbard and others, and also her own and her mother's affidavit, and to refer to the other affidavits and documents filed with the intervening petition of Stuart Wood and others in support of the foregoing averments as Exhibits Nos. 6 and 7.

And she prays:

1st. That the said W. P. Hubbard, E. P. Rucker, C. W. Campbell, and John A. Sheppard may be permitted to ap-

pear here for her for the purposes of this motion and to represent her therein.

2d. That a rule be awarded by this court against the said Henry C. Flesher to show by what authority, if any, he represented or assumed to represent her in the court below and in this court, and why he shall not be attached and his name stricken from the roll of attorneys practicing in this court for his contempt offered this court in falsely assuming to act for her as her attorney in taking and prosecuting said appeal here, and in imposing upon this court a false, fictitious, and manufactured case for the purpose of obtaining this court's opinion on a false statement of facts, to her great injury and to the injury of others similarly situated, but not parties to said suit or appeal.

3d. She also prays that the alleged final decree of the court below be declared absolutely null and void, and that this appeal and said fictitious cause be dismissed; and, in duty bound, she will ever pray, etc.

NANCY C. BROWNING,
By W. P. HUBBARD,
C. W. CAMPBELL.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Petition of Stuart Wood and Others for Rule against Henry C. Flesher and to Remand the Cause.

Your petitioners, Stuart Wood, King Hiram Blankenship, L. D. Chambers, Margaret L. Chambers, Crockett Allison, Joseph Hinchman, W. E. Justice, W. A. Johnson, R. L. Joyce, W. T. Kenneda, John Kenneda, F. M. Kenneda, Bruce McDonald, Willard McDonald, G. R. McDonald, J. F. Paull, A. M. Toler, Alexander Trent, A. A. Vance, Grayton Mining Company, Grayton Water Works and Improvement Company, Forest Coal Company, Spruce Coal and Lumber

Company, William McGee, Richard Torpin, trustee; John Lambert, Jr., trustee; George Wharton Pepper, trustee; J. L. Caldwell, John Q. Dickinson, C. W. Campbell, Egbert Mills; Egbert Mills, trustee; Arthur D. Bight; Arthur D. Bight, trustee; William H. Lawson, and William Kronenwelt, show to the court that they are aggrieved by the pendency in this court of the above-entitled cause and by the decree from which this appeal is taken, rendered in the United States circuit court for the district of West Virginia. They pray that the appeal be dismissed and the cause remanded to the lower court with directions to dismiss the same, or that for reasons herein shown the entire proceeding, as well in the lower court as in this court, be dismissed, and for grounds of this petition they show the following:

There are now pending in the courts of the State of West Virginia and in the United States courts sitting within that State very many cases relating to the lands claimed by Henry C. King, aggregating, according to the grant under which he claims, 500,000 acres, and to which suits there are defendants numbering more than four hundred. These suits are of various kinds, a large number of them being ejectment suits, others suits in equity in which injunctions have been applied for against some of the defendants, and still others are proceedings on the part of the State of West Virginia to sell, as lands forfeited to the State, some part of the lands claimed by said King. In all these cases the same question is presented which is sought to be presented to the court in the above-entitled suit, and in very many of those cases that question is of serious importance.

Your petitioners are informed and believe that this suit has been brought and carried on by the said King without the knowledge of any person interested in the questions involved in this proceeding, and even without the knowledge of the nominal defendants to this suit, up to the time the same was submitted to this court on the 7th day of January, 1901, and for some time thereafter the said King hoping

that by this fictitious proceeding a declaration might be obtained from this court of very great importance and affecting the title to the large area of lands already mentioned and the rights of very many persons who are parties to the actions and suits now pending for the recovery thereof and above mentioned.

In support of the foregoing statement, your petitioners beg leave to refer to the affidavits of John A. Sheppard, William E. Chilton, and William R. Thompson, filed as Exhibits 1, 2, and 3; the joint resolution of the legislature of West Virginia, filed as Exhibit 4, and to the copy of the resolution of the board of public works of the State of West Virginia, filed as Exhibit 5 herewith.

Your petitioners are all owners of parts of the said Morris tract of 500,000 acres and are nearly all parties defendant to the suits and actions pending in the State and Federal courts in West Virginia for the recovery of said lands.

That, while not parties to the above-entitled cause, they are so nearly and directly interested in the subject-matter thereof and in the questions involved in that cause as to be interested in the result thereof, and their interests would be seriously imperiled and jeopardized should the object sought to be attained by this appeal be accomplished. That object they believe and charge to be to obtain from this court in this feigned and fictitious suit the expression of such an opinion or the determination of such facts as would operate as a complete bar to the just and valid defenses which they are seeking to maintain in the actions and suits now pending against them.

Your petitioners are represented by able, efficient, and vigilant counsel in the actions and suits now pending against them in the State and Federal courts in West Virginia, and both they and their attorneys have been alert and vigilant in their efforts to acquire knowledge of all the proceedings of every description undertaken by Henry C. King and by those who represent him for the recovery of

any part of the said Morris tract in any of the said courts in West Virginia.

That they have at all times kept themselves well informed of every suit and action that has been instituted for this purpose; that this claim on behalf of Henry C. King involves the title to a very large part of the lands in West Virginia; that it has attracted the attention and excited the interest and induced the action, not only of the large number of persons directly interested, but of nearly all the population of the State in the region where this large tract lies, and also of the public officers and authorities of the State of West Virginia itself; and yet, notwithstanding this deep interest and the active efforts on the part of parties and counsel to acquire information as to the movements and actions of said Henry C. King and his attorneys with respect to said land, so far as your petitioners have been able to learn, the institution of the above-entitled cause in the circuit court, its pendency therein, the decision thereof, and the appeal to this court have been throughout entirely unknown to any one outside of the said Henry C. King and his attorneys, Maynard F. Stiles and Henry C. Flesher.

That the above-entitled cause does not appear, from the records of the said circuit court of the United States for the district of West Virginia, to have been formally and regularly instituted and proceeded in in that court; but it does appear that no process ever issued against either of the defendants in that cause, and that the orders and decrees which now appear to have been made therein were not entered in the order book of the court, and it does not appear from the records of that court to have been pending therein until the time when application was made by the counsel in said cause to the deputy clerk of said court to certify a transcript of said record for the purposes of this appeal. (See Exhibits Nos. 17, 22.)

I.

This court is without jurisdiction over the persons who appear as parties appellant in this record.

Your petitioners are informed and believe and here charge:

(1.) That the said "Nancy C. Rutherford and S. D. Hatfield" never authorized this appeal to be taken for them or in their names, and never knew of its pendency here until advised of it about the — day of February, 1901; that Henry C. Flesher, who appears by the record to have appeared as their attorney and who assumed to represent them in this cause in the circuit court of the United States for the district of West Virginia, was not in fact the attorney for them or either of them authorized or empowered to represent them in this cause in that court, or to take this appeal for them or in their names to this court; that neither of them were ever served with process to appear and answer the bill filed in this cause in the circuit court, nor did they or either of them appear thereto or authorize or empower said Henry C. Flesher or any other person to appear or plead for them or either of them; that they did not authorize the demurrer to said bill to be filed for them, nor did they know of the filing of said demurrer or of the proceedings had in said cause.

In support of these allegations, they refer to the affidavits of Nancy C. Browning, falsely called Rutherford, and Sarah D. Hatfield, which are filed herewith as exhibits numbered 6 and 7.

II.

The entire proceedings had in this cause both in the circuit court and in this court were feigned and fictitious and in contempt of each court and in fraud of the rights of the defendants in the court below and named as appellants here.

(*a.*) The manifest purpose and object of the persons taking part in the institution and prosecution of these proceedings was to obtain by fraudulent misrepresentation a decree of the Supreme Court of the United States which might be used by them in preventing or defeating the defenses that are now and hereafter may be set up to this suit and to the multiplicity of other suits instituted and now pending in the courts of West Virginia for the recovery of the land claimed by King from the *bona fide* holders thereof.

(*b.*) That the persons by whom these fraudulent and fictitious proceedings have been instituted and conducted are Maynard F. Stiles and Henry C. Flesher; that each of these persons named is the agent and attorney of Henry C. King, in whose name and on whose behalf they have in fact appeared and employed their efforts and continue to do so.

(*c.*) That the said Flesher has, in this proceeding, assumed, without color of authority or right or duty, to appear for and in behalf of "Nancy C. Rutherford" as her duly constituted attorney, and to file pleadings in her name, and to enter into agreements and stipulations and waiver of rights for her, and to take this appeal in her name as "Nancy C. Rutherford," all and each of which acts and doings were altogether without any warrant of authority from her, but were in willful disregard of her rights in the premises and also in manifest ignorance of the name of the person for whom he assumed to appear, whose real name is and has

since 1895 been, by reason of her marriage, Nancy C. Browning, the zeal of the attorney actually blinding him as to the name of the client whom he assumed to represent.

(*d.*) The jurisdiction of this court in this case was obtained by allegations made in the bill, which were false in fact and without which no jurisdiction could attach in such a case, in this, to wit:

"That your orator is the owner in fee and is in the actual possession of a certain tract of land situate partly in said district, in the counties of Wyoming, Logan, Mingo and McDowell and partly in the States of Kentucky and Virginia," etc.; "and

"That your orator is without any plain, speedy and adequate remedy at common law because your orator being in possession of his said grant, and the defendants not being in possession of the said lands claimed by them under said fraudulent instruments, your orator is advised that no action at law will lie against them," etc.

Whereas, as your petitioners aver, the appellee, Henry C. King, was not at the time of filing said bill, is not now, and never has been, in possession of the lands claimed by the said Browning and Hatfield, or in possession of the lands embraced in the grant claimed by him; but that the fact is that said Nancy C. Browning and S. D. Hatfield and those under whom they claim have been in continuous, open, adverse, notorious, and exclusive possession of all the lands claimed by them and sought to be recovered from them by this bill for more than thirty years, subject to the conveyance of the minerals thereunder, made as herein stated by Joseph Hatfield and wife to Henry R. Phillips, trustee.

The want of possession by the plaintiff and the possession by the defendants is established in part by the fact that the said King brought actions in ejectment against many persons, including these defendants, among such actions being "the suit against said defendant and others" mentioned in the bill of the said King in this cause.

That this fact of the possession of the said defendants of these lands bars the jurisdiction of a court of equity and discloses the want of such jurisdiction, and further establishes the defense of adversary possession under the statutes of limitation.

That the decree of the circuit court of Wyoming county, exhibited with the bill in this cause as Exhibit "Wyoming 1897," and relied on here as entitling the complainant to the relief prayed, at the time of the filing of this bill had been assailed and impeached by an independent suit in chancery in said court, charging that said decree had been obtained by the complainant through the fraud of his counsel, the said Maynard F. Stiles, and the taking advantage in any way of said decree had been restrained by an injunction awarded by the judge of said court, which injunction is still operative and is now and was at the date of the filing of this bill and of the decree made thereon in the circuit court of the United States for the district of West Virginia pending in said United States circuit court, to which it had been removed from the circuit court of Wyoming county. (See transcript of bill and decree in said cause, filed here as Exhibit No. 19.)

Further, the said decree of the circuit court of Wyoming county here exhibited had been by the State of West Virginia taken on appeal to the court of appeals of that State and had been superseded. Thereafter, and before the hearing in the United States circuit court of this cause, that decree of the Wyoming circuit court had been reversed, so far as it permitted the redemption of the lands from forfeiture.

(*e*.) It is charged in said bill "that afterwards the said Aly died intestate without having disposed of his pretended title or claim to said 330 or 450 acre tracts, leaving surviving him his only heir-at-law one Joseph Hatfield, who thereafter laid claim to said two tracts."

The said allegation being false in this, that the said Aly

Hatfield had in his lifetime, to wit, on March 14, 1861, disposed of a part of the 330-acre tract by a deed conveying 150 acres thereof to Martha Toler, his daughter, which deed was among the public records of Logan county, out of which Mingo county was thereafter formed.

Further, it is charged in said bill that "the said Joseph Hatfield died intestate, leaving as his only heirs-at-law the defendants above named, who thereupon set up claim of title to the land embraced in said pretended grants and deeds and now wrongfully claim title thereto."

Whereas the truth and fact is that the said Joseph Hatfield in his lifetime, with his wife, the said Sarah D. Hatfield, on October 15, 1889, conveyed the minerals under said land to Henry R. Phillips, trustee, which deed is among the public records of said Logan county, and the said defendants have always recognized the right of the said Phillips, trustee, and his assigns to the said minerals.

If the truth had been told in the bill, the said Henry R. Phillips, trustee, and any persons claiming under him, as well as the said Martha Toler and any claiming under her, would have been necessary parties defendant to the said bill.

In proof of the falsity of these allegations of the bill petitioners beg leave to refer to the transcript of the partial record aforesaid; to the report of the case of the State of West Virginia *vs.* Henry C. King, in 47 West Virginia Reports, page 437; to the duly certified copies of the deed from Aly Hatfield to Martha Toler, and the deed from Joseph Hatfield and Sarah D. Hatfield, his wife, to Henry R. Phillips, trustee, filed herewith as Exhibits —, —, —, —, —, —, —, —, —; to the affidavits of Nancy C. Browning, Sarah D. Hatfield, A. M. Toler, J. M. Toler, Ferrill Hatfield, and Claude L. Gaujot, filed herewith as Exhibits Nos. 8, 9, 10, 11, 12, 13.

(*f.*) That the fraudulent intent and purpose of the said Flesher in assuming to act as counsel for said Nancy C. Rutherford and Sarah D. Hatfield in the pretended defense

of their rights in this cause is apparent from this: That although the bill which he undertook to defend against made specific charges of fraud in the procurement of their title by Aly Hatfield, the grandfather, and by Joseph Hatfield, the husband of Sarah D. Hatfield, and also made the other false and fraudulent representations already recited, yet he, the said Flesher, expressly waived, on behalf of the parties he assumed to represent, the right to deny these material allegations of the bill, but did, on the contrary, admit the truth of the same by filing a demurrer to the bill and resting the final determination of the cause, both in the lower court and in this court, on such demurrer.

Further, that instead of demurring generally to the bill he confined said demurrer to the single feature of the constitutionality of the forfeiture laws of West Virginia, which course of professional conduct on the part of the said Flesher seems to sustain the inference that his sole object was to make a case on which there might be obtained from the Supreme Court of the United States the authoritative declaration of a principle which would serve only the interests and purposes of Henry C. King in the maintenance of suits and actions with which he was infesting the courts of West Virginia.

The location of the western line of the Robert Morris grant of 500,000 acres is vigorously disputed by the said King on one hand and the defendants in the several suits above mentioned on the other hand. Petitioner is advised that if that line is located according to the monuments called for in the grant, and that if it is located properly, the lands involved in this suit are not within the boundaries of the said Robert Morris survey. This defense, as petitioners are informed and believe, would have been a full answer to the claim set up by the said King in his bill, and she is confident such defense would have been successful if properly made. The facts supporting it could have been ascertained without difficulty, and such successful defense could have been made if

Henry C. Flesher, assuming to represent her, had intended to defend the suit against the petitioner in reality instead of defending a case for the purpose of obtaining an opinion from this court in the interest of Henry C. King only, and without argument or the opportunity for argument on behalf of those really interested against the rendition of such opinion.

In proof of the foregoing statement reference may be had to the affidavit of Nancy C. Rutherford and the affidavit of John A. Sheppard, herewith filed as Exhibits Nos. 1 and 7.

III.

The fraudulent intent and purpose of these attorneys, Maynard F. Stiles and Henry C. Flesher, as disclosed in this case, had been previously manifested by them in other proceedings instituted by them for the recovery of parcels of this same Robert Morris grant, in this, to wit:

(*a.*) It is charged in the bill that—

"Your orator is advised that it may be objected or suggested that your orator is negligent in bringing this bill, and that he ought not therefore to have the aid of a court of equity in this behalf; concerning which objection your orator shows that not only ought such objection not to be entertained in this court in which, up to a short time before your orator's purchase of said land the same had been held and managed as a trust estate, but at the time of your orator's said purchase he had no knowledge or notice of such adverse claims by the defendants or of the said pretended grants and deeds, but upon discovering the said claims to said tracts and other lands of your orator some time after his said purchase, your orator brought suit against said defendants and others. And in order to the determination of the legal controversy between your orator and these defendants, especially the question of forfeiture, there being no dispute of fact, *an agreed case* was by the parties heretofore, submitted to and received by this court upon briefs by its order, at its June term, 1895, the Honorable John J. Jack-

son, district judge, presiding; but by reason of the illness of the said judge, no decision of the case was rendered before the said cause of King *vs.* Mullens came on for trial in this court and no decision of said submitted cause has ever been rendered therein."

Your petitioners aver that had the whole truth been told in this bill the appellee would not have ventured to file it. The actual facts of that matter are these:

Some time in the year 1895 a declaration in ejectment was served upon Sarah D. Hatfield, accompanied by a restraining order. At that time considerable interest had been stirred up among the citizens owning land in Logan county, and Mrs. Hatfield had noticed a statement in the newspapers published at Logan Court-house with reference to the citizens employing lawyers to defend the title to their lands. H. K. Shumate, a lawyer then residing at Logan Court-house, whom she had known for a number of years and who had been her counsel in all the litigation she had had and who had been the attorney for her husband, came to her house with a man who was introduced to her as Maynard F. Stiles. They staid all night at her house, and while there Mrs. Hatfield mentioned to Mr. Shumate the fact that suit had been brought against her by Henry C. King for her land, and asked him to represent her in the case; he replied that he could not do so, as he was employed by Henry C. King, but that he was of the opinion it would not be necessary for her to make any defense; that they would not disturb a lone widow and orphans. About two months later the said Shumate and Stiles returned to her house and again staid all night. During the evening the said Stiles sought and obtained a conversation with her in reference to what had occurred between Mr. Shumate and her when they were at her house before. Mr. Shumate told her that Mr. King and his counsel did not take anything from widows and orphans, and that they would like to see her protected in the ownership of her lands, and stated that if she would allow them to attend to

her interests in the suit brought by King against her that she would not have to pay any lawyers' fees or costs; that they would pay all expenses for her, and that she should not be out anything; that if it became necessary for her to go anywhere to aid them, that they would pay all of her expenses, and in the event King finally recovered her land that they would reconvey her lands to her, and that she should have the right to go on and remove any timber from her lands that she desired to.

Mr. Stiles further said that it would be better for her to make this arrangement with him than it would be for her to go to the expense of hiring a lawyer to defend her title, and that Mr. King and his counsel could afford to have her title defended for her, pay all the expenses connected therewith, and reconvey the lands to her, because it would save them a great deal of expense and probably save Mr. King this whole tract of land; that Mr. King and his counsel had certain lawyers employed who would take cases for the citizens sued by Mr. King and work to the interest of Mr. King in such cases, and that they could have one of such lawyers take care of her interest in the suit. She told Mr. Stiles that she did not know what lawyer she could get, to which Mr. Stiles replied that Major H. C. Flesher, of Welch, West Virginia, was doing business for King and his counsel, and that he could get Flesher to attend to her case. That some time after, Mr. Henry C. Flesher came to her on a railroad train and told her that he had been employed to look after her interests in the suit brought against her and others by Henry C. King; that a month later Flesher stated to her that he wanted her to sign a writing with him, which she did. She never saw or read the agreed statement of facts that she has been told was filed by the said Flesher in the Federal court at Parkersburg, which she is informed Flesher signed as counsel for William Claypool, Nancy C. Rutherford, and herself.

It further appears that the record in said ejectment case

in which the alleged agreement of facts was filed has mysteriously disappeared. Diligent search in the clerk's offices of the courts and in the offices of counsel in that case have been unable to recover it. It does appear, however, that the said Flesher signed such agreed statement of facts as attorney for Mrs. Hatfield, for Nancy C. Rutherford, and for William Claypool.

It appears further that upon the filing of said agreed statement of facts a rule was awarded against said Flesher to appear and show cause by what authority he had assumed to appear for and enter into such agreed statement of facts on behalf of William Claypool, whom he there assumed to represent, which said rule remains undisposed of.

The writing which Mrs. Hatfield signed at the request of Henry C. Flesher appears to be a paper bearing date of 1st of July, 1895, by which she is made to ratify and confirm all that Flesher had done in her name. It is enough to read the paper to see by whom it was prepared and what exigency it was intended to meet.

It further appears that William Claypool, one of the parties for whom said Flesher made said agreed statement of facts, made affidavit that some time in 1895 he was informed of the institution of the action of ejectment by Henry C. King, and that one "Colonel Wilder" and the attorney, H. K. Shumate, requested said Claypool to allow the said Henry C. King to represent or have represented the said Claypool in said action or suit, stating that he should be at no expense in employing counsel to defend his interest therein, or in paying any of the expenses attending the said action or suit, all of which would be paid by the said Henry C. King, and that no matter what was the result of said action or suit when finally determined, that said Claypool would be fully protected from the consequences thereof and in no event would he lose his land.

That said Claypool never saw Henry C. Flesher in regard to looking after his interest in said action or suit; that he

never employed him as his attorney in said action or suit, nor did he ever employ him in any capacity; that he did not employ said H. K. Shumate as his attorney to defend or protect his interests in said action or suit.

It further appears that the said Nancy C. Browning, called Rutherford, had not authorized or employed the said Flesher to appear as her counsel in the said ejectment suit or to enter into any agreed statement of facts for her or on her behalf, nor had she employed him at any time, in any proceeding, for any purpose to represent her as her attorney.

In support of these statements petitioners refer to the affidavits of William Claypool, Amanda Claypool, Sarah D. Hatfield, Nancy C. Browning, and John A. Sheppard, and the certificate of the clerk of the United States circuit court for the district of West Virginia, and the certificate of the clerk of the United States circuit court for the southern district of West Virginia, which affidavits and certificates are here filed as Exhibits Nos. (1), (6), (7), 14, 15, 16, 17, 18, 22; and the rule awarded by the United States circuit court in the case of *King vs. Altizer* against H. C. Flesher, filed here as Exhibit 20.

(*b.*) That the said Maynard F. Stiles in alleging in the bill in this cause that Henry C. King was in possession of the lands embraced in his grant, and that the petitioner and S. D. Hatfield were not in possession of the lands claimed by them, was stating what he well knew at the time to be untrue in fact, because it appears that he had for a long time been intimate with the lands of Mrs. Hatfield and Mrs. Browning, had repeatedly visited them, had spent considerable time on the lands, and was fully aware of their actual possession at the time of the filing of this bill, by residence, cultivation, and enclosure, long-continued.

That said Stiles was counsel for said Henry C. King in the actions of ejectment brought by said King against numerous defendants for lands alleged to be included in the

Morris grant, and among those defendants your petitioner and Mrs. Sarah D. Hatfield, against whom said King had brought ejectment for the lands now in question, and that such actions could not have been instituted and maintained without showing that King was out of possession and the defendants in possession of those lands; that said Stiles was therefore fully aware that the allegations in the bill in this cause that King was in possession of the lands embraced in his grant and the defendants were not in possession of the lands claimed by them was false. In support of these statements see affidavit of A. M. Toler, filed as Exhibit No. 23.

It is likewise manifest that as to many of the other matters which have been before shown were falsely stated in the said bill the said Stiles had full knowledge and was well aware that the statements in the bill in those particulars were not true.

(*c.*) The professional career of the said Maynard F. Stiles and Henry C. Flesher, as the same is disclosed by the public records of the courts of West Virginia, is altogether in keeping with their disreputable conduct as before herein disclosed, in this, to wit:

That in a proceeding by the State of West Virginia against Maynard F. Stiles in the circuit court of Wyoming county, it was by that court, on March 30, 1899, adjudged that the said Stiles "has conducted himself in a manner unworthy of a reputable attorney-at-law and has abused his privilege as an honorable member of the bar of this court so as to render it improper that he should be allowed to further practice his said office as attorney-at-law at the bar of this court, and doth therefore order that the name of the said Maynard F. Stiles be, and it is hereby, stricken from the roll of attorneys practicing at the bar of this court, and that he, the said Maynard F. Stiles, be, and he hereby is, forever

prohibited from exercising his said office of attorney-at-law in this court."

That upon a writ of error to said judgment from the supreme court of appeals of West Virginia, the said judgment was reversed and annulled, as appears from the report of said cause in 37 S. E. R., p. 620.

The acts of the said Stiles which were involved in that proceeding were acts done by him in the course of litigation carried on by him for his client, Henry C. King, with reference to claims made under his said Morris grant and in procuring the decree of redemption on September 30, 1897, which is mentioned in the bill of Henry C. King in this cause.

The facts respecting the acts of said Stiles in that respect appear fully from the record of that proceeding, a copy of which, printed for use in the hearing of said writ of error, is filed with the clerk of this court for such inspection and use as this court may think it entitled to.

That in the action at law of Thompson & Jackson against the said Henry C. Flesher in the circuit court of Jackson county, West Virginia, it was by that court, on the 19th day of March, 1892, adjudged that the said plaintiffs recover against the said Henry C. Flesher the sum of $212.97, with interest thereon, on account of the moneys collected by him as the attorney for the plaintiffs and then in his hands as such attorney; and it was "further considered by the court that the license of the said Henry C. Flesher as an attorney-at-law be, and the same is hereby, suspended until he, the said Henry C. Flesher, shall pay and satisfy to the plaintiffs the said sum of $212.97, with interest thereon from this day until paid."

A certified copy of the record of this proceeding is filed with the clerk of this court for such inspection and use as the court may see fit to give to it.

Your petitioners have filed with this their petition the affidavit of Mrs. Sarah D. Hatfield, who was one of the apparent defendants to the bill in the circuit court and one of

the appellants here. They think it proper to place this court in full possession of all the facts and circumstances within their knowledge affording light as to the motives and conduct of all the persons connected with the matter. They accordingly file here a letter of October 4, 1901, from Mr. John A. Sheppard to the counsel in this cause, showing how and on what conditions he obtained the affidavit of Mrs. Hatfield, and also the offer of indemnity to Mrs. Hatfield from some of the petitioners here, filed as Exhibits Nos. 24 and 25.

They also refer to the affidavit of Mr. Edward C. Lyon, filed here as Exhibit No. 26.

They also refer to the affidavit of S. U. G. Rhodes, here filed as Exhibit No. 27.

Your petitioners pray that they may be permitted to intervene in this proceeding, not for the purpose of becoming parties to the above-entitled cause, but for the purpose of challenging the jurisdiction of this court and of the circuit court, and of bringing to the attention of this court, in this direct form, the fact of the large and various outstanding interests which would be injuriously affected by the opinion and decree sought to be obtained in this court, and of praying that all the proceedings had, as well in the lower court as in this court, be annulled and set aside, and that such action be taken by this court for the prevention of like wrongs and injuries as are here sought to be perpetrated as to the court may seem proper, and especially that such action be taken against the said Henry C. Flesher and Maynard F. Stiles, by whom these proceedings have been instituted and prosecuted, as may be adequate and efficient to prevent its repetition by them as enrolled attorneys of this court and of the circuit court.

HOLMES CONRAD,
W. P. HUBBARD,
C. W. CAMPBELL,
Counsel for Petitioners.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Motion on Behalf of the State of West Virginia.

That the decree in the court below be declared null and void;

That all proceedings in this case in this court and in the court below be set aside and annulled;

That the decree below be reversed without considering the merits of the case, or (in the alternative) that the appeal to this court be dismissed, and that in either event a dismissal of the bill herein be directed;

That Maynard F. Stiles and Henry C. Flesher, attorneys of this court and heretofore acting counsel in this case, be disbarred; and

That the court take into consideration the conduct of the said attorneys in this case as ground for proceeding against them for contempt of the court.

On Monday, January 21, 1901, by order of this honorable court, the submission of the above-entitled case was set aside and the cause was restored to the docket for oral argument; the clerk of this court was also directed to bring the order of the court to the attention of the attorney general of West Virginia.

Edgar P. Rucker, by whom the State appears for the purposes of this motion, was then the attorney general of the State of West Virginia, and, in accordance with the order of this court, the proceedings had by it in this case were brought to his attention by the clerk of this court.

The questions sought to be raised in this case having an important bearing upon the revenues of the State of West Virginia, involving a direct attack on its constitution and statutes, and directly affecting the titles to a very large area of its land, the governor of the State sent to the legislature a special message calling attention to the pendency of the case.

Thereupon the legislature, on February 13, 1901, adopted a joint resolution reciting that it was important to the State that the provisions of its constitution forfeiting lands for non-entry for five years and transferring such lands to certain classes of claimants and occupants should be upheld, to the protection of the State's revenue and for the titles of many of her citizens, such resolution also authorizing and directing the board of public works of the State to employ its attorney general and other counsel, if deemed advisable, to appear on behalf of the State and argue the cause in this court, as far as its rules and practice would permit.

A certified copy of said joint resolution is herewith filed, marked Exhibit "A" of this motion.

On February 14, 1901, the board of public works of the

State of West Virginia, in pursuance of said action of the legislature, by resolution authorized and directed Edgar P. Rucker, the attorney general, to appear in this court and make such defense in this case and take such action in regard thereto as, in his opinion, might be necessary to uphold the constitutional provisions aforesaid, and to maintain and preserve the property rights of the citizens of this State, vested in them by reason of the operation of the said constitutional provisions.

Copy of the said resolution of the board of public works is herewith filed, marked Exhibit "B" of this motion.

Although the term of office of the said Edgar P. Rucker, as attorney general, has ended, he is, by virtue of the resolution aforesaid and his continued employment in this case by the proper officers of the State of West Virginia, duly authorized to appear here and represent its interests in said case.

Said counsel for the State, desiring and intending to the best of his ability to maintain and uphold the validity of the constitutional provisions and statutes aforesaid, first investigated the history of this case and the proceedings had therein for the purpose of ascertaining in what manner the questions as to such constitutional provisions were presented, and for said purpose he also conferred with the representatives of private interests affected thereby. Upon such investigation and conference facts were brought to the attention of the attorney for the State which have satisfied him that this case presents to the court no real controversy, but that it is wholly a fictitious proceeding, entirely under the control of the said Henry C. King and his counsel, feigned by the said King and his said counsel for the purpose of obtaining from this court, in the absence of any real opposition, an opinion and decree which would affect injuriously the revenues of the State of West Virginia and the titles to a very large area of its lands; and, further, that the pendency of this suit has, as far as possible, been concealed from the

numerous persons whose interests might be affected by its result and were intended to be so affected.

The attorney for the State is advised that the facts which have thus come to his knowledge should be laid before the court in order that such proceedings may be had as are necessary and proper to prevent the wrong and fraud which has thus been attempted, and to put it in the power of the court to take such steps as to it may seem proper with respect to the persons concerned in such attempted wrong and fraud.

The facts above mentioned are fully set forth in the several motions of Stuart Wood and others, Nancy Browning, Egbert Mills, and A. M. Toler, together with the affidavits and other documentary evidence submitted as exhibits thereof, which motions and exhibits have been read and considered by the attorney for the State of West Virginia, and which it is expected and intended will be filed in this court at the same time as this motion.

The attorney for the State of West Virginia is satisfied that the several allegations of the said motions and exhibits are true, and he refers to and adopts the same as part of this motion, and prays that they may be so regarded by the court.

In consideration whereof the State of West Virginia, by Edgar P. Rucker, its attorney, as aforesaid, moves this honorable court:

1. That the decree appearing to have been entered in the above-entitled case on the 2d day of June, 1900, by the circuit court of the United States for the district of West Virginia, sitting at Charleston, in said State, may by this court be declared and decreed to be a nullity;

2. That all proceedings had in this court before the said 21st day of January, 1901, and all proceedings in this cause in the said circuit court of the United States for the district of West Virginia be set aside and held for naught;

3. That the said decree of the circuit court, entered on the 2d day of June, 1900, may, by the decree of this court, be reversed without considering the merits of the case, or (in the alternative) that the appeal here be dismissed, and that in either event a dismissal of the bill herein be directed by this court;

4. That Maynard F. Stiles and Henry C. Flesher, attorneys of this court, be disbarred;

5. That this court take into consideration the conduct of the said attorneys in this cause as ground for proceeding against them for contempt of the court;

6. To the ends aforesaid, and in order that due notice of this motion and the proceedings thereon may be given, that all necessary or proper rules or orders be made by this court, directed to the said Henry C. King, Maynard F. Stiles, and Henry C. Flesher, to be served and returned here, as this court may order and direct; and

7. For such other and further relief as, upon the facts shown to the court, may to it seem meet and proper.

STATE OF WEST VIRGINIA,
By EDGAR P. RUCKER, *Counsel.*

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

SARAH D. HATFIELD ET AL., APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Petition of Intervention and Motion to Dismiss of A. M. Toler.

The petitioner, A. M. Toler, respectfully represents unto the court that he on the — day of ——, 18—, intermarried with Martha Hatfield, the daughter of Aly Hatfield, who, by deed dated the — day of ——, 1861, conveyed unto his said daughter, Martha, the wife of this petitioner, two tracts of land then situate on Ben creek, in Logan county, Virginia, now Mingo county, West Virginia, the one containing about 150 acres and being a part of the 330-acre tract described in the record of this cause as patented to Aly Hatfield, and the other containing about 50 acres, adjoining the first tract, and likewise being a portion of the Aly Hatfield land. A copy of said deed is exhibited with the petition herein of Stuart Wood *et al.*

That issue were born alive unto the petitioner and his wife, the said Martha, and that the said Martha subsequently died leaving your petitioner and said issue surviving her, whereby your petitioner became and is, under the laws of the State of West Virginia, seized of an estate for his own life as tenant by the curtesy of the two tracts of land aforesaid, as well the one of 150 acres as the one of 50, that had been conveyed to his wife, as aforesaid.

That, being so seized, he and his children after the death of his wife continued in the actual, open, and adverse possession of said land until the present time and were in the actual possession of the same at the date of the institution of this suit in the circuit court of the United States for the district of West Virginia and are still in the actual possession thereof.

That Henry C. King claims to be the owner of a tract of 500,000 acres of land situate in the States of Virginia, West Virginia, and Kentucky, which, according to the contention of the said King, embraces within its boundaries the two tracts of land of your petitioner aforesaid, and, so claiming said land, instituted an action of ejectment in the circuit court of the United States for the district of West Virginia against the petitioner and many others owning lands within the alleged boundaries of said 500,000-acre survey for the purpose of recovering the same, which said ejectment is still pending and undetermined as to the petitioner and many other of the defendants therein.

That this petitioner and the other defendants in said ejectment, as he is informed, will rely in part, as a defense thereto, upon the fact that the title of the said King to said 500,000 acres of land has forfeited to the State of West Virginia by reason of the failure of the said King to have the same entered for taxation, under the constitution of said State, upon the land books of the proper county for five successive years since the year 1869, and by virtue of the provisions of said constitution the title so vested in the State has been

transferred to junior claimants of the land. And the said King, upon the other hand, will contend that the provision of the State constitution aforesaid relied upon by the petitioner and the other defendants to said action of ejectment is in conflict with the provisions of the Federal Constitution, null and void, and that his title to said land is in consequence not forfeited to the State of West Virginia and has not been transferred to junior claimants of the land, and that such alleged forfeiture neither does nor will constitute a defense to said action of ejectment.

That the said Henry C. King, desiring to obtain an opinion of this court upon the constitutional question aforesaid that would be prejudicial to the title and interests of this petitioner and the other defendants to the action of ejectment, as this petitioner is informed and believes, instituted the present suit in the circuit court, and, through his counsel, M. F. Stiles, procured Henry C. Flesher, an attorney practicing in said court, to appear thereto without any authority whatever, as counsel for the sole defendants therein, and without their knowledge or the knowledge of either of them, and to make such defense thereto as would falsely give the court jurisdiction, omitting the defense of the statute of limitations, and presenting the constitutional question aforesaid in as favorable light as possible to the contention of the said King.

That, as this petitioner believes, it was the aim and object of the said M. F. Stiles and Henry C. Flesher to have this suit so conducted as that all but fictitious and collusive defenses thereto would be prevented, and in consequence and in pursuance of such object Sarah D. Hatfield and Nancy C. Rutherford (now Nancy C. Browning) were alone made defendants thereto, notwithstanding the interest of the petitioner in and his possession of a portion of the very land in question, and process was not issued against or served upon even the said Sarah D. Hatfield or Nancy C. Rutherford, but the said Henry C. Flesher, as this petitioner believes, colluding, as aforesaid, with the said Stiles, attorney for the

said H. C. King, entered an appearance for both of them without their knowledge or authority.

Your petitioner further says that after the rendition of the decree of the circuit court herein in favor of the said H. C. King the said Flesher appealed the cause to this court in the name of the defendants below, and without their knowledge or consent, and for the purpose of procuring the judgment of this court upon the constitutional question aforesaid in an unauthorized, collusive, and fictitious suit, as aforesaid, and to the end that this petitioner and others might be prejudiced thereby.

Reference is here made to the affidavits of Sarah D. Hatfield, Nancy C. Browning, John A. Sheppard, W. E. Chilton, William R. Thompson, and to the petition and motion of Stuart Wood and others filed herein, and they are asked to be read and considered in connection with this petition.

Your petitioner therefore prays that he be permitted to intervene here, and that the decree herein be reversed and the cause remanded for the following reasons, to wit:

1st. Because the suit is fictitious and collusive.

2d. Because the suit was instituted and is now prosecuted not to determine any real controversy between the parties to the record, but to obtain a decree on which to prosecute actions of ejectment against persons really interested adversely to the appellee, but not parties to the record, and among them this petitioner.

3d. Because this suit is a fraud upon and in contempt of this and the circuit court.

And your petitioner prays such other relief and action by the court as may be conformable to its rules and the principles of equity.

HOLMES CONRAD,
C. W. CAMPBELL,
JOHN H. HOLT,
Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 221.

SARAH D. HATFIELD ET AL., APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Petition of Intervention and Motion to Reverse and Remand of Arthur D. Bright.

The petitioner, Arthur D. Bright, respectfully represents unto the court that he is the owner of the mineral in and under three certain tracts of land situate on Ben creek and the waters thereof, in the county of Mingo, State of West Virginia, the one containing 140 acres and the other containing 450 acres, as well as the owner of the mineral in and under all that portion of a third tract containing 330 acres, likewise situate on Ben creek, in the said county, that was not conveyed by Aly Hatfield to his daughter, Martha Hatfield, subsequently Martha Toler, all of which said tracts

are known as the Aly Hatfield land, and are the same tracts described in the plaintiff's bill in this cause, and the Hatfield title to which was canceled, at the prayer of the plaintiff, by the decree of the circuit court herein.

That Henry C. King, the appellee, claims to be the owner of a tract of 500,000 acres of land situate in the States of Virginia, West Virginia, and Kentucky, which, according to the contention of said King, embraces within its boundaries the three tracts of land above described, and the mineral under which is owned by your petitioner, and, so claiming said land, instituted an action of ejectment in the circuit court of the United States for the district of West Virginia against Sarah D. Hatfield, the owner of the surface of the three tracts aforesaid, and many other persons owning lands within the alleged boundaries of the said 500,000-acre survey for the purpose of recovering the same, which said ejectment is still pending and undetermined as to many of the defendants thereto.

That this petitioner, when he shall likewise be impleaded, as he believes he will be, by the said King and the other defendants to said ejectment, as he is informed, will rely in part as a defense thereto upon the fact that the title of the said King to said 500,000 acres of land has forfeited to the State of West Virginia by reason of the failure of said King to have the same entered for taxation, under the constitution of the State of West Virginia, upon the land books of the proper county for five successive years, since the year 1869, and by virtue of the provisions of the said constitution the title so vested in the State has been transferred to junior claimants of the land; and the said King, upon the other hand, will contend that the provision of the State constitution aforesaid relied upon by the petitioner and the other defendants to the present action of ejectment is in conflict with the provisions of the Federal Constitution, null and void, and that his title to said land is in consequence not forfeited to the State of West Virginia, and has not been

transferred to junior claimants of the land, and that said alleged forfeiture neither does nor will constitute a defense to said action of ejectment.

That the said Henry C. King, desiring to obtain an opinion of this court upon the constitutional question aforesaid that would be prejudicial to the title and interests of this petitioner and the defendants to the present action of ejectment, as this petitioner is informed and believes, instituted the present suit in the circuit court, and, through his counsel, M. F. Stiles, procured Henry C. Flesher, an attorney practicing in said court, to appear thereto, without any authority whatever, as counsel for the defendants therein, and without their knowledge or the knowledge of either of them, and to make such defense thereto as would falsely give the court jurisdiction, omitting the defense of the statute of limitations and presenting the constitutional question aforesaid in as favorable light as possible to the contention of the said King.

That, as this petitioner believes, it was the aim and object of the said M. F. Stiles and Henry C. Flesher to have this suit so conducted that all but fictitious and collusive defenses thereto would be prevented, and that in consequence and in pursuance of such object Sarah D. Hatfield and Nancy C. Rutherford (now Nancy C. Browning) were alone made defendants thereto, notwithstanding the interest of the petitioner in the very land in question, and process was not issued against or served upon even the said Sarah D. Hatfield or Nancy C. Rutherford; but the said Henry C. Flesher, as this petitioner believes, colluding, as aforesaid, with the said Stiles, attorney for the said Henry C. King, entered an appearance for both of them without their knowledge or authority.

Your petitioner further says that after the rendition of the decree of the circuit court herein in favor of the said Henry C. King the said Flesher appealed the cause to this court in the name of the defendants below, and without their knowl-

edge or consent, and for the purpose of procuring the judgment of this court upon the constitutional question aforesaid in an unauthorized, collusive, and fictitious suit, and to the end that this petitioner and others might be prejudiced thereby.

Reference is here made to the affidavits of Sarah D. Hatfield, Nancy C. Browning, John A. Sheppard, W. E. Chilton, William R. Thompson, Edward C. Lyon, and to the petition and motion of Stuart Wood and others filed herein, and they are asked to be read and considered in support of this petition.

Your petitioner therefore prays that he be permitted to intervene here, and that the decree herein be reversed and the cause remanded for the following reasons, to wit:

1st. Because the suit is fictitious and collusive.

2d. Because the suit was instituted and is now prosecuted, not to determine any real controversy between the parties to the record, but to obtain a decree on which to prosecute actions of ejectment against persons really interested adversely to the appellee, but not parties to the record, and among them this petitioner.

3d. Because this suit is a fraud upon and in contempt of this and the circuit court.

And your petitioner prays such other relief and action by the court as may be conformable to its rules and the principles of equity.

W. P. Hubbard,
Attorney for Petitioner.

EXHIBIT No. 1.

STATE OF WEST VIRGINIA, }
—— *County,* } *To wit:*

John A. Sheppard, being duly sworn, upon his oath says: "I am counsel for persons interested against the claims made by Henry C. King under the Robert Morris patent for five hundred thousand acres. Although I had endeavored to keep myself fully informed as to the state and progress of all litigation in both the State and United States courts in West Virginia with reference to that title since 1894, and supposed I had done so, I did not hear of the existence of the case of Henry C. King against Sarah D. Hatfield and Nancy C. Rutherford until about three weeks, as affiant is informed, after it was submitted to the Supreme Court of the United States.

My clients thereupon requested me to make an investigation with regard to that case, its good faith, its progress and its condition, and in endeavoring to comply with that request I applied to Sarah D. Hatfield as well as to other persons for information on the subject.

My first interview with Mrs. Hatfield was about February 20, 1901. Learning at that time that she was in the town of Williamson, W. Va., where I reside, I sent J. M. Toler to request her to come to my office, and she came in company with him and other persons. I asked her if she knew that there was a case pending in the Supreme Court of the United States styled Sarah D. Hatfield and Nancy C. Rutherford *vs.* Henry C. King in which it had been decided by Judge Jackson that their title to the land on which they lived was void and that the lands were rightfully owned by Henry C. King. She said she knew of the case but did not consider that she had lost her land. I requested her then in several questions to tell me what she did know about that case and what arrangement, if any, she had with any person to secure her land. She declined to tell me what arrangement she had made about her lands, but said that she expected to live on the lands as she had before. I then stated to her that the court had decided that she had no title to the lands and that

she would certainly have to move off if the Supreme Court of the United States sustained that decision. She seemed to have no fears as to the loss of her land, and I received the impression that she had made an arrangement with King or those acting for him by which they were to reconvey to her the lands that they had recovered by the decision of Judge Jackson, whereupon I told her that I wanted to give her to understand plainly that the course she was taking in the case was establishing a precedent that would act to the prejudice of her neighbors and all others owning land inside of the King claim, and that I felt like telling her plainly that we, meaning those interested adversely to King, felt like we knew that she had entered into a collusive arrangement with King. She, however, declined to make any further statement as to how she expected to hold her land. She left my office without giving me information as to what she had done in relation to the case.

Later I was told by Crockett Allison, one of her neighbors, that he believed Mrs. Hatfield was willing to reveal what had actually occurred between her and Henry C. King's representatives in relation to her land. I told Mr. Allison to see her, and if she was willing to do so to bring her back to Williamson, which he did. She came to my office in company with said Allison a month or two later and told me that she had been thinking over what I had said to her when there before, and that she did not know that the arrangement she made with King's representatives would operate to the prejudice of any other person, and after thinking the matter over fully she decided she would tell me what she had done, but that if she did tell me she would want me to promise her that I would not use it, or if I did use the information that I would see that she would be protected in the ownership of her land, and in case the information she gave me would cause her to lose the land that I should see that she was paid for it. I told her that I could not obligate myself either to save her lands for her or to pay her for the same in the event of their loss, but I said to her that I would not use the information unless she consented thereto, and that if she felt like revealing to me what she had done with King's representative after what I had said to her, that I would be glad to have her tell me.

Mrs. Hatfield and myself had been well acquainted for the last fifteen years. Her husband Joseph Hatfield and myself

were very friendly during his lifetime, and I was often at his house, and in that way especially became well acquainted with Mrs. Hatfield.

Mrs. Hatfield said to me that she knew I had been fighting for the citizens in the various suits brought by Henry C. King against them and that I ought to know more about it than she, and she wanted to tell me what she had done and see whether she had done wrong or had put herself in an improper position. She then told me the arrangement she had made with M. F. Stiles, attorney for Henry C. King, which is set out in detail in her affidavit dated on the 30th of September, 1901.

After she had repeated to me the substance of what is stated in the affidavit mentioned, I again told her that I could not use this information except by her consent, and that I would not use it if I determined that its use would injure her in her chances of recovering her lands. She stated that if the people I represent would agree to pay her for the lands in case she lost them, that they might then use the information that she had given me, but I told her that I could not make her such a promise. Afterwards I had a conference with associate counsel, and it was decided that I should obtain an affidavit from Mrs. Hatfield setting forth the agreement between her and Stiles, the representative of King, which I did on the 30th of September, 1901. When she gave me the affidavit I gave her a letter bearing the same date. A copy of my letter is hereto attached. She stated to me that if I should use the affidavit and King and his representatives had any intention of reconveying to her the lands she had lost by the decree, that they would then not convey the land to her at all, but if the action she had taken was likely to *cost* other people to lose their lands that she was willing that I should use this affidavit providing that I would see that she was paid for her lands. I told her that I could not make such promise and that all that I could say to her on the subject was what was stated in my letter above referred to. I had in mind at the time that she might have been guilty of collusion with King's representatives in the cause styled Henry C. King *vs.* Simon S. Altizer and others, and in the agreed statement of facts signed William Claypool, S. D. Hatfield and *her* Nancy C. Rutherford by Henry C. Flesher, their attorney, but that collusive agreement between them did not extend to the case styled Sarah

D. Hatfield and Nancy C. Rutherford *vs.* Henry C. King, pending in the Supreme Court of the United States, and therefore as a legal proposition she would not be found guilty of fraud in the last-mentioned case and left by the court under the rule in such cases as it found her, but that she would be able to make defence against the decree standing in favor of King as much as her daughter would be. Therefore I said to Mrs. Hatfield that if I decided that she could make defence against the decree and that her action in the first instance would not bind her in the case in the Supreme Court that I would use her affidavit, but if I decided otherwise I would not use it, and if my clients thought the affidavit was of such importance as that they should want to use it they could arrange with her about the use of it."

Affiant further says, that he was employed as associate counsel and took part in the trial in the court below of the case of Henry C. King *vs.* Mullins and McClintock. On the first trial Judge Jackson presided which resulted in the disagreement of the jury, and on the second trial Judge Goff presided resulting in the verdict and judgment for the defendants; that he also took part as counsel for defendants in the trial of the case of King *vs.* Elk Horn and Sandy River Land Trust at Harrisonburg, Virginia, in 1895, and King *vs.* Watkins, Campbell and others at Abington, Virginia in 1899, at both of which trials Judge Paul of the western district of Virginia presided; that upon each of said trials one of the chief questions at issue was, the true location of the 500,000 acres of land known as the Robert Morris grant claimed by King—the said King contending that only the first line of the survey was run by the original surveyor prior to the grant and that all the other lines were platted in his office and without knowledge of or familiarity with the location of the water-courses and corners called for in the grant, or the territory covered thereby. While the defendants then and now claim that said grant should be located according to the natural monuments found and identified and marked corner trees shown to have existed at the places called for in the grant instead of locating said tract by course and distance as contended for by King, and that where there is a conflict between the courses and distances and such natural monuments and marked corner trees, that the latter should prevail.

Affiant further says, that if the western boundary line of

such grant be located from the corner called for by a small branch of Knox creek, crossing said Knox creek at about four miles, Sandy river at twelve miles at the mouth of Turkey creek, the dividing ridge between Sandy river and Guyandotte river, crossing Gilberts creek twice to three sugar trees in a bottom of Guyandotte river about 20 poles below the mouth of Gilberts creek, then the lines of S. D. Hatfield and Nancy C. Browning are not within the Morris grant but lie to the west thereof. The existence and location of said Gilberts creek, Turkey creek and Knox creek are well known, and that the fact of such contention of the location of said western boundary line was and is notorious among the people throughout the larger portion of the counties of Logan, Wyoming, Mingo and McDowell, West Virginia, and was especially well known among all the lawyers engaged in any way in the litigation set on foot by said King.

JNO. A. SHEPPARD.

Taken, subscribed and sworn to before me as witness my hand and seal this 11th day of October, 1901.

[Seal of Geo. W. A. White, Notary Public, District of Columbia.]

GEO. W. A. WHITE,
Notary Public.

EXHIBIT No. 2.

STATE OF WEST VIRGINIA, } *To wit:*
County of Kanawha, }

William E. Chilton, being first duly sworn, upon his oath says that he is 43 years of age; that he resides in the city of Charleston, in said county and State, and that he is an attorney-at-law by profession; that he is one of the defendant- in an action of ejectment brought about 1895 in the circuit court of the United States for the district of West Virginia, by Henry C. King against S. S. Altizer or —— Williamson, and numerous others; that when said action of ejectment was brought, and for a considerable time thereafter, he claimed, title to a certain boundary of land of several thousand acres, situated on Alum creek of Tug river, formerly Logan county, but now Mingo county, West Virginia, which boundary is composed of a number of small contiguous tracts, some of which were granted by patent to William Cline by the Commonwealth of Virginia, and some of which were granted by the State of West Virginia by deeds executed by the commissioner of school lands of said Logan county;

That afterwards affiant conveyed said boundary of land to the Brier Mountain Coal Company, with covenants of general warranty. Affiant further states that he participated as one of the attorneys for the defendants on the trial of the case of Henry C. King against Alexander McClintock, John McClintock and M. B. Mullins before the circuit court of the United States, for the district of West Virginia, sitting at Parkersburg, which trial resulted in a verdict and judgment in favor of said defendants, and to which judgment the said Henry C. King prosecuted a writ of error in the Supreme Court of the United States, in which court said judgment was afterwards affirmed.

That he is a member of the law firm of Chilton, MacCorkle & Chilton, and that said firm practices regularly in the circuit court of the United States for the district of West Virginia, especially at its sittings at Charleston, and that affiant attends regularly the sittings of said court in said city.

That he has been from the institution of said action of ejectment and now still is interested in the questions involved in said case; that he was so interested and that he had taken part in the defense of the ejectment aforesaid was well known to Millard F. Stiles, the attorney for Henry C. King.

Affiant further states that he is informed that the said Henry C. King instituted a suit in equity in the circuit court of the United States for the district of West Virginia at Charleston, against Sarah D. Hatfield and one Na-cy C. Rutherford, so called, for the purpose of cancelling and declaring null and void certain patents of land issued by the Commonwealth of Virginia and also certain deeds for land executed by the commissioner of school lands of Logan county, which lands, as affiant is informed, were and are claimed by said defendants Hatfield and Rutherford.

That affiant never knew of the institution or pendency of said cause in said court nor of the opinion filed by the judge in said cause or of the appeal taken to the Supreme Court of the United States until after the case was decided in said circuit court or after he heard it had been decided. That if affiant had had knowledge of the institution of said suit and its objects and purposes he would have made an effort to have been heard in opposition to the principles sought to be established by the bill in said cause; that as affiant is informed and believes a large number of the members of the bar practicing in the circuit court of the United States for the district of West Virginia, at Charleston, are interested for clients in the questions presented by said bill, and to affiant's knowledge many titles to land in West Virginia depend upon the validity of the constitution and laws of West Virginia forfeiting lands for non-entry and non-payment of taxes for five years.

That the litigation instituted by the said Henry C. King in the circuit court of the United States for the district of West Virginia has attracted wide attention among the bar of the southern part of said State and has directly affected numerous persons occupying and claiming lands within the boundary claimed to be embraced by the tract of land claimed by the said Henry C. King under the Robert Morris grant for 500,000 acres.

W. E. Chilton.

Taken, subscribed and sworn to before me in my county and State aforesaid, this 7th day of October, 1901.

Given under my hand and notarial seal this 7th day of October, 1901.

[Seal of A. D. McCorkle, Notary Public, Kanawha County, W. Va.]

A. D. McCORKLE,
Notary Public in and for Kanawha County, West Virginia.

STATE OF WEST VIRGINIA, }
County of Kanawha, } ss:

I, E. W. Staunton, clerk of the county court of Kanawha county, in the State of West Virginia, do hereby certify, that A. D. McCorkle whose name is signed to the foregoing certificate, is now, and was at the time of signing the same, a notary public in and for said county and State, duly appointed and qualified, that to all his official acts full faith and credit are due and that his signature is genuine.

Seal County Court, Kanawha County, West Virginia.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 7th day of October, 1901, and in 39 year of the State.

E. W. STAUNTON,
Clerk Kanawha County Court.

EXHIBIT No. 3.

STATE OF WEST VIRGINIA, }
County of Cabell, } *To wit:*

I, William R. Thompson, upon my oath say that I am a member of the law firm of Vinson and Thompson and that the said firm has since the beginning of the litigation looking to the recovery of the Morris grant, now claimed by Henry C. King, been employed by a large number of people claiming adverse to the said King, and the said firm now represents a large number of adverse claimants, and a member of said firm has appeared in court representing some of the defendants in the case of King *vs.* Mullins, tried in the United States circuit court for the district of West Virginia; King *vs.* Watson, in the circuit court for the western district of Virginia; King *vs.* Campbell *et als.* in the same court; King *adv.* Vinson, receiver, *et al.*, in the circuit court of the United States for the district of West Virginia; and State *vs.* King *et al.*, in the circuit court of Cabell county, West Virginia; and that the members of said firm, Vinson and Thompson, have been reasonably diligent in keeping track of and watching all litigation in regard to the said King title; that this affiant knew nothing of the case of King *vs.* S. D. Hatfield and Nancy C. Rutherford and never heard of said suit until after the same had been taken to the Supreme Court of the United States upon a writ of error.

WM. R. THOMPSON.

Subscribed and sworn to before me in my said county, this 9th day of October, 1901.

E. M. WATTS,
Notary Public.

STATE OF WEST VIRGINIA:

CABELL COUNTY COURT CLERK'S OFFICE.

I, F. L. Doolittle, clerk of the county court of Cabell county, in the State aforesaid, do hereby certify that E. M.

Watts, whose name is signed to the annexed writing bearing date the 9th day of October, 1901, is a notary public in and for said county, duly appointed and qualified, and is authorized by the laws of this State to take the acknowledgment of deeds and other writings, to administer oaths, and to take affidavits; and that the name thereto subscribed is, I verily believe, his genuine signature.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at the court-house of said county, this 9th day of October, 1901.

[Seal County Court, Cabell County, West Virginia.]

F. L. Doolittle,
Clerk Cabell County Court.

EXHIBIT No. 4.

JOURNAL OF THE HOUSE OF DELEGATES, SESSION OF 1901.

2 O'CLOCK P. M.

The house reassembled at the expiration of the recess.

On motion of Mr. Colcord, unanimous consent being given, house joint resolution No. 39,

Whereas, there is now pending in the Supreme Court of the United States a case styled "S. D. Hatfield *et al.*, appellants *vs.* Henry C. King," No 526 October term, 1900, on appeal from the circuit court of the United States for the district of West Virginia, rendered on June — last, which adjudges that sections 3 and 6 of article XIII of the constitution of this State, forfeiting lands for non-entry for five years and transferring the lands to certain classes of claimants and occupants, are null and void; and

Whereas, the said Supreme Court on the 21st day of January, 1901, ordered the said cause to be argued orally and that the attorney general of the State be furnished a copy of said order and of the records and briefs of counsel therein; and

Whereas, it is important to the State that said constitutional provision be upheld for the protection of the State's revenue and of the titles of many of her citizens, and others depending upon the validity of said provisions:

Therefore, pursuant to the recommendations of the governor of the State in a special message, be it

Resolved by the legislature of West Virginia, That the board of public works be, and is hereby authorized and directed to employ the attorney general of the State and other counsel if it should deem advisable, to appear on behalf of the State and argue said cause orally at the bar of said court, and also if permitted by said court, file printed briefs thereon.

Resolved further, That the foregoing resolution be referred to the committee on forfeited and delinquent lands.

Was taken up out of its order for immediate consideration, with the amendments thereto proposed by the committee on forfeited and unappropriated lands.

The clerk reported the amendments as follows:

Resolved, That the board of public works be, and it is hereby authorized and directed to employ the attorney general of the State at a compensation not to exceed $500.00, and obtain such other counsel as such board may see fit and be able to secure without any expense to the State, to appear on behalf of the State and argue said cause orally at the bar of said court, and, also, if permitted by said court, file printed brief thereon.

On motion of Mr. Alderson, the amendment was amended by striking out the figures "$500.00," and inserting in lieu thereof the figures "$1,000.00."

The question being on the adoption of the amendment, as amended, the same was adopted.

On the adoption of the resolution,

The ayes were:

Messrs. Wilson (speaker), Alderson, Aten, Baker, Bartlett, Brammer, Brannon, Bryant, Carter, Chambers, Christopher, Cochran, Colcord, Cushwa, Davies, Fisher (of Morgan), Good, Grant, Hall, Handley, Hanna, Harlow, Harris, Hays, Hearn, Hervey, Jarrett, Johnson, Kenney, Laughlin, Lilly, Lowry, Luzader, Martin, Mitchell, Morgan, Murphy, McClintic, McClure, Nicely, Owens, Pritchard, Reynolds, Roberts, Scherr, Sinclair, Smith (of Ohio), Smith (of McDowell), Stapleton, Steck, Talbot, Washburn, Wetzel, Willis, Wilson (of Wayne), Woodyard and Zinn.—57.

The noes were:—None.

Absent and not voting:

Messrs. Darst, Fisher (of Braxton), Grover, Henshaw, Jackson, Law, Millender, McCoy, McCulloch, McIntosh, Stump, Swisher, Via, and Williams.—14.

So a majority of those voting, having voted in the affirmative, the resolution was adopted.

Ordered, That Mr. Colcord communicate the adoption of the resolution to the senate, and request the concurrence of that body therein.

EXHIBIT No. 5.

At a meeting of the Board of Public Works of the State of West Virginia, held at the capitol, on the 14th day of February, 1901.

The legislature of this State now in session, having passed house joint resolution No. 39, providing that it shall be the duty of the board of public works to employ the attorney general of this State and to secure the services of other counsel for the purpose of defending the case of S. B. Hatfield *et al.*, appellants, *vs.* Henry C. King, appellee, now pending in the Supreme Court of the United States, in which it is contended by the appellee that sections 6 and 3 of the constitution of the State of West Virginia contravenes the 14th amendment to the Constitution of the United States, and the board of public works now deeming it important to the revenue of the State as well as to the upholding of the titles of many of her citizens to their lands; therefore, by virtue of the authority vested in this board by reason of said joint resolution, it is hereby

Resolved, That Edgar P. Rucker, the attorney general of this State, be and he is hereby authorized, empowered and directed to appear in the Supreme Court of the United States and make such defense in the case above mentioned, and take such steps as in his opinion are necessary to uphold the constitutional provisions aforesaid, and to maintain and preserve the property rights of the citizens of this State vested in them by reason of the operation of the constitutional provisions mentioned.

The attorney general is also authorized to secure the services of such other counsel, in accordance with the provisions of the joint resolution of the legislature above referred to, to assist him in said case as in his judgment may be deemed necessary. And it is further ordered that the attorney general be allowed the sum of $1,000 for his services in this case.

A copy.

Teste:

WM. M. O. DAWSON,
Secretary of the Board of Public Works.

EXHIBIT No. 6.

STATE OF WEST VIRGINIA, }
County of Mingo, } *To wit:*

Nancy C. Browning being first duly sworn upon oath says that she is thirty-one years of age; that she is the daughter of Joseph Hatfield, now deceased, and Sarah D. Hatfield; that she first married one John Rutherford now deceased and that on the 25th day of December 1895 she married her present husband Albert Browning.

Affiant further says she is informed that a suit in equity was brought against her as Nancy C. Rutherford and Sarah D. Hatfield, her mother, by one Henry C. King in the circuit court of the United States for the district of West Virginia for the purpose of cancelling two grants from the Commonwealth of Virginia to her grandfather Aly Hatfield in the year 1859, one for 450 acres and one for 330 acres, situate then in Logan county but now in Mingo county West Virginia on the left fork of Ben creek and also three certain deeds to her father Joseph Hatfield from the commissioner of school lands for Logan county, one for 72 acres one for 48 acres and one for 140 acres situate on said left fork of Ben creek and its waters and adjoining said tracts of 450 and 330 acres as clouds upon the alleged title of said Henry C. King to said lands under his claim of title to the Morris grant of 500,000 acres and that one Henry C. Flesher of Welch West Virginia pretended to appear for her in said suit as her attorney and to represent her therein.

Affiant further says that she had no notice or knowledge whatsoever that said suit was to be brought or was brought; that no summons to answer in said suit was served upon her or in any manner brought to her notice; that she never in any manner or at *at* any time directly or indirectly employed or authorized the said Henry C. Flesher to represent her in said suit or to appear for her therein or to represent her in any other controversy or matter pertaining to her said lands or the title thereto and that she never at any time authorized any other person or persons to employ said Flesher or any other attorney to appear for or represent her in said

suit; that she never authorized said Flesher to sign for her the agreement in writing purporting to have been made between Henry C. King this affiant and her mother Sarah D. Hatfield which she is informed was filed in the said circuit court of the United States for the district of West Virginia and refer-ed to in the plaintiffs' bill filed in said cause now pending on appeal as above recited and that she never authorized any other person to employ said Flesher or other person to sign such agreement; that she never until recently had any knowledge that said Henry C. Flesher had assumed to act for her in said suit or that he claimed authority to represent her as her attorney in any suit or matter whatever; that said Flesher has no authority to represent her in said suit pending on appeal as aforesaid which appeal she is informed has been taken from a decree against her and her mother to the Supreme Court of the United States where it is said that said appeal is now still pending and undetermined.

Affiant further says that had she known of the pendency of said suit while the same was pending in said circuit court of the United States for the district of West Virginia she would have employed counsel and made defense therein; that she has a good and valid defense to said suit—

First on the ground that the above tracts of land owned by affiant and her mother are not within said Morris grant and that said Henry C. King has no title to the lands of affiant and her mother above mentioned and

Second. If the said lands of affiant and her mother are within the said Morris grant the right claimed thereto by said Henry C. King has long since been barred by adversary possession held by her, her father and mother and her grandfather.

Affiant further says that the 450 and 330 acre tracts were in the actual, adverse open exclusive and continuous possession of said Aly Hatfield from the dates of the grants therefor until his death, as affiant is informed, except as to a part of the 330 acres which he conveyed to his daughter Martha who intermarried with A. M. Toler and upon the death of said Aly Hatfield, as affiant is informed, her father Joseph Hatfield entered into such possession of said lands and so continued to hold the same until his death on the 9th day of March 1893 when said lands descended to affiant

who together with her mother Sarah D. Hatfield has continued in such possession to this day.

That neither said Henry C. King nor any person under whom he claims said Morris grant ever had possession of said lands or any part thereof or of any part of said Morris grant.

Affiant further says that said tracts of 48, 72, and 140 acres of land, from the date of the deeds therefor were in the actual open exclusive and continuous possession of affiant's father Joseph Hatfield until his death and that they have been held in such possession by affiant and her mother since the death of affiant's father.

Affiant further says that her father in his lifetime owned certain other lands derived from his father Aly Hatfield situate on the left fork of Ben creek and its waters which adjoin said tracts of 450 and 330 acres and the whole constituted the home and farm of her father Joseph Hatfield; that portions of said 450 and 330 acres have been cleared enclosed and cultivated and oc-upied, to affiant's certain knowledge, for more than twenty years last past; that no part of said tracts of 450, 330 48, 72 and 140 acres or of the other lands owned by affiant's father which de-cended to affiant has at any time within the memory of affiant been in the adverse possession of any person as against her father Joseph Hatfield or against her and her mother Sarah D. Hatfield.

Affiant further says that she was born and reared upon the said land and has lived thereon during the thirty-one years of her life except four year- and during that period her father and mother and tenants lived upon and cultivated said lands.

NANCY C. BROWNING.

Taken subscribed and *and* sworn to before me this September 13th 1901.

M. A. HATFIELD, *Justice.*

STATE OF WEST VIRGINIA, *Mingo County,* } *To wit:*

I, James Damron, clerk of the county court, which is a court of record in and for the county and State aforesaid, do certify that M. A. Hatfield, whose name is signed to the

foregoing writing was on the 13th day of September, 1901 a justice of the peace, (duly qualified) in and for the county and State last mentioned, and that he is authorized under the laws of my said State to administer an oath. I further certify that I am acquainted with his signature and that his signature as signed to the foregoing writing is genuine.

Given under my hand and official seal this the 16th day of September, 1901.

[Seal County Court, Mingo County, West Virginia.]

JAMES DAMRON, *Clerk.*

EXHIBIT No. 7.

STATE OF WEST VIRGINIA, *Mingo County*, } *To wit:*

Sarah D. Hatfield, being first duly sworn, says that she is the widow of Joseph Hatfield, deceased, and resides on Ben creek, on the lands of which Joseph Hatfield died, *seized*, part of which were owned by Aly Hatfield, the father of Joseph Hatfield, in his lifetime.

That she has lived at the Joseph Hatfield home, which is located on the lands aforesaid, for 32 years; that her home consists of a large two-story dwelling-house, two barns, quite a number of outbuildings, and a large orchard; that the dwelling-house is surrounded by an orchard and meadows, with farming lands above and below, which were in a state of cultivation long before affiant married the said Joseph Hatfield, which occurred on the 13th of April, 1869.

Affiant further says that her daughter, Nancy C. Browning, who first married one Rutherford, was again married to Albert Browning, on the 25th day of December, 1895.

Affiant further says that she is the same Sarah D. Hatfield, and her daughter the same Nancy C. Rutherford mentioned in the declaration in ejectment hereto attached, which was served upon her some time in the year 1895, and also mentioned in the restraining order hereto attached, which was likewise served upon her in the year 1895.

Affiant further says that about the time the declaration in ejectment and restraining order were served upon her, there was considerable interest stirred up among the citizens owning land, and that she had noticed a statement in the newspaper published at Logan Court-house, with reference to the citizens employing lawyers to defend the titles to their lands. About that time H. K. Shumate, a lawyer then residing at Logan court-house, whom she had known for a number of years and who had been her counsel in all the litigation she had had, and who had been the attorney for her husband, came to her house with a man who was introduced to her as M. F. Stiles. They remained over night at her house, and while there, affiant mentioned to Mr. Shumate the fact

that suit had been brought by Henry C. King for her land, and requested him to attend to her interest in the case. He said he could not do so, as he was employed by King, but that he was of opinion it would not be necessary for her to make any defence, that they would not disturb a lone widow and orphans.

About two months later the said Shumate and Stiles returned to her house and again stayed all night. During the evening the said Stiles sought and obtained a conversation with her in reference to what had occurred between Mr. Shumate and her when they were at her house before. Mr. Stiles told affiant that they (meaning King and his counsel) did not take anything from widows and orphans, and that they would like to see her protected in the ownership of her lands, and stated that if affiant would allow them to attend to her interest in the suit brought by King against her, that she should not have to pay any lawyer fee or costs. That they would pay all expenses for her and that she should not be out anything, and if it became necessary for her to go any place to aid them, that they would pay all her expenses, and in the event King finally recovered her land, that they (meaning King and his counsel) would reconvey to her her lands, and that she should also have the right to go on and move any timber from her lands that she desired to.

Mr. Stiles further said that it would be much better and easier for her to make this arrangement with him than it would be for her to go to the expense of employing a lawyer to defend her title, and that they (meaning King and his counsel) could afford to have her title defended for her, pay all the expenses connected therewith, and reconvey the lands to her, because it would save them a great deal of expense and probably save Mr. King his whole tract of land and that they (meaning King and his counsel) had certain lawyers employed who would take cases for the citizens sued by Mr. King, and work to the interest of King in such cases, and that they could have one of such lawyers take care of her interest in the suit. She told Mr. Stiles that she did not know what lawyer she could get. That Mr. Shumate, her lawyer, represented them; to which Mr. Stiles replied that Major H. C. Flesher, of Welch, W. Va., was doing business for them (meaning King and his counsel), and that he could get Flesher to attend to her case.

Affiant further says that she had been in litigation and

was caused therein to pay out considerable money over her lands in another suit to settle up her husband's estate, which had cost all the money she had, and had been able to make, and that she felt that she was unable to employ counsel to defend her in the King suit, and not knowing that it was wrong, or would put her in an improper position, but feeling that she had the right to contract as she chose with reference to the defence of her suit and also acting under the advice of Mr. Shumate, and believing that Mr. Stiles was dealing fairly with her, she consented to the arrangement proposed by Stiles, and that it was further and finally agreed on that occasion that the agreements proposed by Stiles should be put in the shape of a contract in writing, and also that they would execute and deliver to her a contract in writing showing that her land was to be reconveyed to her by Mr. King in the event he recovered the same in the suit. Mr. Stiles told her, however, that they did not have time to draw the writing at that time, but that Mr. Shumate would prepare the same and deliver it to her.

Some time thereafter, a man came to her on the train on the Norfolk & Western railroad from Huntington, and told her that he was H. C. Flesher, of Welch, and that he had been employed to look after her interest in the suit brought against her and others by Henry C. King. The next time she saw said Flesher was probably a month later, when, pursuant to arrangements made with her by said Stiles, she came to Wharncliffe to meet Mr. Flesher and went with him to Gray, a station on the Norfolk & Western railroad, about five or six miles west of her railroad station, Wharncliffe. Said Flesher stated that he wanted her to sign a writing with him, which she did, and which is hereto attached.

She never saw or read the agreed statement of facts that she has been told was filed by the said Flesher in the Federal court at Parkersburg, which she is told said Flesher signed as counsel for William Claypool, her daughter Nancy, and her.

Affiant further says that the arrangement she made with said Stiles, which has been hereinbefore set out, was with reference to the action of ejectment styled Henry C. King against Simon S. Altizer and others, and the suit in equity ancillary thereto, to enjoin her and others from removing timber. That she did not contemplate any other suit or

know that any other suit would be brought against her by the said Henry C. King.

Affiant further says that in the early part of February, 1901, she thinks about the 10th or 12th, she received a letter from Henry C. Flesher, for her to come to Welch at once. That she was sick and could not go for a few days, but about a week later she did go, and for the first time she was then told by the said Henry C. Flesher that a suit had been brought in the Federal court before Judge Jackson by Henry C. King against her and her daughter Nancy, and that the case had been decided against them and that they had appealed the case to the Supreme Court of the United States. This was the first information of any kind that affiant ever had of this suit or of its decision—that no summons or other process therein was served upon her.

Affiant then requested to know if she could go on and cut timber, but was told by said Flesher that she must not do so. She then requested said Flesher to have a deed for her land delivered to her from Mr. King, according to the agreement Stiles had made with her, to which said Flesher replied that Mr. Wilder, the agent, or Mr. Stiles, the attorney, for King, would be at Welch in a few days and he would then have a proper writing prepared giving her back her land, and send it to her,—that they were straight in their dealings with her in reference to these matters, and would carry out the arrangement fully. Affiant says, however, that no such paper has ever been delivered to her, and that it now seems that she has been duped by them and in her ignorance of the law, as well as her desire to get out of litigation, they have taken advantage of her to her prejudice, and even to the loss of her home and all she has.

Affiant further says that her daughter Nancy C. Browning, so far as she knows, never at any time made a contract with the said King or his representatives in relation to her land or the suit against the same, and that this affiant had no authority to act for her said daughter, and that she did not act or attempt to act for her in the defence of her lands, but that the agreement as hereinbefore set out was not known to nor participated in by her daughter.

SARAH D. HATFIELD.

Taken, subscribed and sworn to before me, as witness my hand and seal this 30th day of September, 1901.

[Seal Circuit Court, Mingo County, West Virginia.]

CHAS. H. BRONSON,
Clerk Circuit Court, Mingo County, West Virginia.

Witness:
C. H. BRONSON.

ETHEL COLE,
Stenographer and Typewriter.

In the Circuit Court of the United States for the District of West Virginia, Fourth Judicial Circuit.

Henry C. King, a citizen and resident of the State of New York, plaintiff, complains of Simon S. Altizer, Aaron Altizer, J. Altizer, Joseph Altizer, J. C. Alderson, W. W. Adams, H. C. Avis, John R. Browning, Chapman Browning, Joseph Browning, Aaron Browning, Levi Browning, Russell Browning, Albert Browning, Loran Browning, Jesse L. Browning, Milton Browning, William C. (commonly called Chapman) Browning, Cloyd Bailey, King Hiram Blankenship, Henry Blankenship, Richard B. Blankenship, J. H. Blankenship, J. M. Blankenship, U. B. Buskirk, Curtis Ballard, Eli Blankenship, Joseph H. Blankenship, Larkin Cline, G. W. Cline, William Cline, Moses C. Cline, Anthony Cline, Abe Cline, Harrison Cline, L. D. Chambers, Margaret L. Chambers, Martha J. Chambers, James L. Chambers, Sidney Chambers, William Claypool, P. B. Dobbins, trustee; John Davis, Sherman Davis, Charles Elkins, Uriah W. Elkins, Crockett Allison, Leander Ellis, Scott Ellis, J. B. Ellison, A. J. Ellis, O. F. Ferrell, L. B. Godfrey, Joel Gibson, Anderson Grimmett, J. N. Gibson, Joseph Hinchman, L. D. Hinchman, George Hinchman, Sarah D. Hatfield, Alexander Hatfield, F. M. Harless, Ward Hatfield, W. E. Justice, C. E. Justice, W. A. Johnson, R. L. Joyce, W. T. Kenneda, John Kenneda, F. M. Kenneda, S. P. Kelly, Lewis J. Lester, Pleasant Lester, Bruce McDonald, Wayne McDonald, William W. McDonald, Millard McDonald, G. R. McDonald, Alexander McClintock, John McClintock, George Mounts, Elijah Mounts, M. B. Mullins, Joseph Murphy, M. J. Morgan, James A. Nighbert,

Oliver Perry, Jasper Perry, J. F. Paul, J. A. Peck, William Riffe, William Riffe, Jr., Nancy C. Rutherford, Lewis Riffe, Leander Riffe, L. D. Riffe, E. H. Simpkins, Joseph Simpkins, J. S. Stafford, Ralph Steel, Harrison Steel, J. A. Sheppard, Samuel Stafford, W. G. Sansom, Martha Steel, A. M. Toler, J. C. B. Toler, A. H. Toler, J. M. P. Toler, J. C. Toler, Mary B. Toler, Lara Z. Toler, Nettie Toler, J. E. Toler, Alexander Trent, F. Marion Trent, A. A. Vance, Charles Walker, Preston Walker, J. E. Chilton, trustee; citizens and residents of said State of West Virginia, and Grayton Mining Company, Grayton Water Works and Improvement Company, Forest Coal Company and Spruce Coal and Lumber Company, corporations organized under the laws of said State of West Virginia, and Bowman Lumber Company, a foreign corporation doing business in said State of West Virginia, defendants, of a plea of trespass, to wit: that heretofore, to wit: on the 1st day of January, A. D. 1894, the plaintiff was possessed in fee of a certain tract or parcel of land in the States of Virginia, West Virginia and Kentucky, being a tract of land granted to Robert Morris by the Commonwealth of Virginia, by patent dated June 23d, A. D. 1795, and in said patent described as follows:

Beginning at two poplars and two chestnut trees on a branch of Guyandotte river, about six miles from the mouth of Little War creek, a branch of Sandy river, being a corner of a survey of said Nicholas of 480,000 acres, and of a survey of 320,000 acres made for said Nicholas and Jacob Kinney, and with a line of the latter S. 33 degrees W. 6,720 poles, crossing a dividing ridge and down War creek to the mouth, crossing Sandy river at six miles, crossing Panther creek at nine miles, and crossing several ridges to four white oaks on the northwest bank of Knox creek and thence leaving said survey W. 3,840 poles, crossing said creek and some of the branches thereof and along the spurs of the ridge dividing the waters of said creek and Peter's creek, a branch of Sandy river, to three poplars and a sugar tree by a small branch of Knox creek; thence N. 8,000 poles, crossing Knox creek at about four miles, Sandy river at twelve miles, at the mouth of Turkey creek and up said creek and the N. W. forks of same, crossing Buffalo creek, Pigeon creek, and the dividing ridge between Sandy and Guyandotte rivers and Gilbert's creek twice, a branch of Guyandotte, to three sugar trees in a bottom of said river and about 20 poles below the

mouth of Gilbert's creek, and thence N. 10 degrees E. 4,450 poles, crossing Guyandotte river, several small branches and some ridges to pointers; thence E. 6,620 poles, crossing Guyandotte river and several branches thereof, to three sugar trees and a buckeye, by a small branch of the same, being the N. W. corner of a survey of said Nicholas of 480,000 acres, and thence with same S. 6,800 poles, crossing Huff's or Cain creek, to the beginning.

And that plaintiff being so possessed of said land, as aforesaid, defendants afterwards, to wit: on the 1st day of April, A. D. 1894, entered upon that portion thereof lying in the said State of West Virginia, and unlawfully withhold the possession of same from plaintiff, to the damage of plaintiff in the sum of fifty thousand dollars ($50,000.00). And plaintiff says, that the value of the matter in dispute herein exceeds the sum of five thousand dollars ($5,000.00), exclusive of costs.

Wherefore plaintiff brings this suit.

In the Circuit Court of the United States for the District of West Virginia, Fourth Judicial Circuit.

To Simon S. Altizer, Aaron Altizer, J. Altizer, Joseph Altizer, J. C. Alderson, W. W. Adams, H. C. Avis, John R. Browning, Chapman Browning, Joseph Browning, Aaron Browning, Levi Browning, Russell Browning, Albert Browning, Loran Browning, Jesse L. Browning, Milton Browning, William C. (commonly called Chapman) Browning, Cloyd Bailey, King Hiram Blankenship, Henry Blankenship, Richard B. Blankenship, J. H. Blankenship, J. M. Blankenship, U. B. Buskirk, Curtis Ballard, Eli Blankenship, Joseph H. Blankenship, Larkin Cline, G. W. Cline, William Cline, Moses C. Cline, Anthony Cline, Abe Cline, Harrison Cline, L. D. Chambers, Margaret L. Chambers, Martha J. Chambers, James L. Chambers, Sidney Chambers, William Claypool, P. B. Dobbins, trustee; John Davis, Sherman Davis, Charles Elkins, Uriah W. Elkins, Crockett Allison, Leander Ellis, Scott Ellis, J. B. Ellison, A. J. Ellis, O. F. Ferrell, L. B. Godfrey, Joel Gibson, Anderson Grimmett, J. N. Gibson, Joseph Hinchman, L. D. Hinchman, George Hinchman, Sarah D. Hatfield, Alexander Hatfield, F. M. Harless, Ward Hatfield, W. E.

Justice, C. E. Justice, W. A. Johnson, R. L. Joyce, W. T. Kenneda, John Kenneda, F. M. Kenneda, S. P. Kelly, Lewis J. Lester, Pleasant Lester, Bruce McDonald, Wayne McDonald, William W. McDonald, Millard McDonald, G. R. McDonald, Alexander McClintock, John McClintock, George Mounts, Elijah Mounts, M. B. Mullins, Joseph Murphy, M. J. Morgan, James A. Nighbert, Oliver Perry, Jasper Perry, J. F. Paul, J. A. Peck, William Riffe, William Riffe, Jr., Nancy C. Rutherford, Lewis Riffe, Leander Riffe, L. D. Riffe, E. H. Simpkins, Joseph Simpkins, J. S. Stafford, Ralph Steel, Harrison Steel, J. A. Sheppard, Samuel Stafford, W. G. Sansom, Martha Steel, A. M. Toler, J. C. B. Toler, A. H. Toler, J. M. P. Toler, J. C. Toler, Mary B. Toler, Lara Z. Toler, Nettie Toler, J. E. Toler, Alexander Trent, F. Marion Trent, A. A. Vance, Charles Walker, Preston Walker, J. E. Chilton, trustee; citizens and residents of said State of West Virginia, and Grayton Mining Company, Grayton Water Works and Improvement Company, Forest Coal Company and Spruce Coal and Lumber Company, corporations organized under the laws of said State of West Virginia, and Bowman Lumber Company, a foreign corporation doing business in said State of West Virginia, defendants:

You are hereby notified that the foregoing declaration in ejectment will be filed in the office of the clerk of said circuit court, at Charleston, West Virginia, on the first Monday of March, A. D. 1895, and if you fail to appear and plead thereto, judgment will be given against you.

HENRY C. KING,
By MAYNARD F. STILES,
His Attorney.

[Endorsed:] In the circuit court of the United States for the district of West Virginia, fourth judicial circuit. Henry C. King, plaintiff, *vs.* Simon S. Altizer *et als.*, defendants. Declaration. Maynard F. Stiles, Dotson, W. Va., attorney for plaintiff.

In the Circuit Court of the United States for the District of West Virginia, at Chambers.

HENRY C. KING, Complainant, *vs.* H. S WHITE, ALBERT KENNADA, WILLIAM Kennada, John White, J. M. Vance, Johnson Trent, Keenan Sansom, John Long, Jefferson Adkins, Wallace H. McDonald, Joseph B. Browning, J. S. Steele, Perry Steele, Ralph Steele, John Rutherford, Elliot Rutherford, Nancy C. Rutherford, Sarah D. Hatfield, C. W. Osborn, and —— Simpkins, Defendants.	In Equity.

This day the complainant, Henry C. King, presented his bill to the undersigned, one of the judges of this court, praying amongst other things for an injunction to restrain and inhibit the defendants from cutting and removing timber from off the land of complainant as set out and described in the bill. Upon consideration whereof it is ordered that the bill in this cause be filed, and that process issue thereon.

It is further ordered that the defendants, and each and every one of them, be restrained and inhibited from cutting and removing any timber from off of the land of complainant, as described and set out in this bill, or in anywise committing waste thereon.

No bond is required at this time; and the motion and application for a permanent injunction is set down for hearing on the 23d day of this month at Charleston, West Virginia, and a copy of this order served upon each of the defendants shall be deemed and held as sufficient notice of the motion for this injunction.

John Rose is hereby appointed to serve a copy of this order upon each of the defendants.

(Endorsed:) Enter. Jackson, judge. March 14, '95.

A true copy from the record.

(Seal Circuit Court United States, District of West Virginia, Charleston, West Va.)

Teste: L. B. DELLICHER,
Clerk Circuit Court U. S., D. W. Va.

A copy.
Teste. L. B. DELLICHER, *Clerk.*

At a circuit court of the United States for the district of West Virginia, continued and held at Charleston, in said district, on Saturday, the 23rd day of March, A. D. 1895, the following order was made and entered of record:

HENRY C. KING, Complainant,
vs.
H. S. WHITE ET ALS., Defendants. } In Equity.

This cause came on to be heard this day upon application of complainant for injunction and upon the rule awarded herein on the 14th day of March, 1895, and it appearing to the court that said rule had not been served upon said defendants it is by the court ordered counsel for complainant and defendants consenting that the restraining order awarded herein on the 14th day of March, 1895, be continued in force till the further order of this court, and that said defendants show cause, if any they can, before this court at Charleston, on the 23d day of May, 1895, why said restraining order and injunction should not be made permanent.

And it is further ordered that a copy of this order served upon said defendants in conjunction with said order of March 14th shall be due service hereof, and John Rose is specially designated and appointed to make such service.

A true copy from the record.

(Seal Circuit Court United States, District West Virginia.)
(Charleston, West Va.)

Attest: L. B. DELLICHER,
Clerk Circuit Court U. S., D. W. Va.

A copy.
Teste: L. B. DELLICHER, *Clerk.*

In the Circuit Court of the U. S. for the District of West Virginia, and now pending at Parkersburg, West Va.

H. C. KING, Plaintiff,
vs.
ALTIZER ET AL., Defendants. } In Ejectment.

Whereas, the undersigned did in May, 1895, employ Henry C. Flesher as my attorney in the above-entitled suit;

And whereas, I did in such employment authorize my said attorney to represent me in the stipulation signed by him in

said cause and dated about the 15 day of June 1895; and whereas also, I did authorize my said attorney to do any legal act in and about my defence in said suit and that would end the same,

I hereby confirm the authority of my said attorney, and also of any other attorney, that may be selected by said Flesher to appear with him in said suit and defend the same for me, whenever the same shall be tried, and to do any act therein that may seem to them best to do in the premises, and I hereby ratify and confirm any and all acts that my said attorney or the one selected by him, and who shall appear in said suit.

I have no privity with any other defendant in said suit, and the other defts therein took no interest in my affairs or in connection with my defence in said suit until *very* recently, and I do not think that their motives are entirely disinterested in my behalf, at this time.

Witness my hand this 1st day of July 1895.

SARAH D. HATFIELD.

Witnesses:

J. W. PETERS.
Mrs. J. W. PETERS.
Mrs. E. M. HAMPTON.
W. H. FLESHER.

EXHIBIT No. 8

STATE OF WEST VIRGINIA, } *To wit:*
County of Logan, }

W. A. Lee, being first duly sworn, says, upon oath, that he is deputy for S. S. Altizer, clerk of the county court of said county; that the record of the deed from Aly Hatfield and Anna, his wife, to Martha Toler, bearing date the 14th of March, 1861, has been mutilated in part, and that the certified copy of said deed hereto attached is all of the record of said deed now remaining in said clerk's office, and that the record of the other portion of said deed has been mutilated and destroyed.

W. A. LEE.

Taken, subscribed and sworn to before the undersigned authority in and for said county, as witness his hand and official seal this the 4th day of October, 1901.

[Seal of W. A. Brazie, Notary Public, Logan County, W. Va.]

W. A. BRAZIE,
Notary Public.

This deed made the 14 of March in the year of 1861 between Aly Hatfield and Anna Hatfield *and Anna Hatfield* his wife, of the first part and Martha Toler and her heirs of the second part.

Witnesseth: That in consideration of the sum of one dollar in hand paid by the said Martha Toler, the said Aly Hatfield & Anna Hatfield his wife, doth grant unto the said Martha Toler her & heirs a certain tract or parcel of land lying & being in the county of Logan containing 200 acres more more or less & situated on Ben creek, water of Sandy

Beginning on a poplar & lynn on the west side of the creek, crossing the creek, thence running up the point to the top of the ridge
to two black oaks, thence down the creek about one mile to a

black oak on the ridge, then with the creek and then down the creek
the lower corner, to two lynns, thence up the creek on the other
to the beginning, the said Aly Hatfield and Anna Hatfield
right title, interest & right they have and the said
part covenant all the party of the second part.
warrant specially the property hereby conveyed.
following signatures and seals the day and

ALY HATFIELD. [SEAL.]
ANNA HATFIELD. [SEAL.]

TY OF LOGAN, *To wit*:

F. Varney a justice of the peace in and for the
aforesaid, State of Virginia do certify that Aly
signed the writing hereto an-exed bearing
of March 1861 hath acknowledged the same before me
Given under my hand this the 14th day of

SAMUEL F. VARNEY, *J. P.*

In the County of Logan.

We Samuel F. Varney & Efram Hatfield justices of the peace in and for the county of Logan do certify that Anna Hatfield, wife of Aly Hatfield whose names *are* signed to the writing hereto an-exed Jan. the 14th day of March 1861 personally appeared before me in the county aforesaid, and being examined by me privily and apart from her husband and having the writing fully explained to her, she the said Annie Hatfield acknowledged the same writing to be her act and deed & that she has willingly executed the same and does not wish to retract it.

Given under *h*our hands the 14th March 1861.

SAMUEL F. VARNEY, *J. P.*
EFRAIM HATFIELD, *J. P.*

In Logan county court clerk's office March 18th 1861 this deed was admitted to record.

Teste: WM. STRATON, *Clk.*

WEST VIRGINIA:

In Logan County Court Clerk's Office.

I, W. A. Lee deputy for S. S. Altizer clerk of the county court of said county, do certify that the foregoing is a true copy as fully as the same appears of record in said office.

Given under my hand and the seal of said court this 27th day of September 1901.

[Seal County Court, Logan County, West Virginia.]

W. A. LEE, *Deputy*,
For S. S. ALTIZER, *Clerk*.

EXHIBIT No. 10.

STATE OF WEST VIRGINIA, *Mingo County,* } *To wit:*

A. M. Toler, being first duly sworn, upon his oath states that he resides on Ben creek, in said county of Mingo, one mile below the residence of Sarah D. Hatfield, and that he has resided there for 43 years last past.

Affiant further says that he is acquainted with V. A. Wilder, the agent, and M. F. Stiles, the attorney, for Henry C. King, and is also acquainted with H. K. Shumate, who is likewise attorney for Henry C. King in his attempt to establish title to wha is known as the Morris 500,000-acre tract of land, and that he has known the first two named since about the year 1894, and has known the said H. K. Shumate all his life.

Affiant further says that the said Shumate is well acquainted with the Aly Hatfield and Joe Hatfield lands on Ben creek now owned by Sarah D. Hatfield and Nancy C. Browning. That he is not only familiar with the same in a general way, but is acquainted therewith as a surveyor and has a map thereof, and that he has also visited the homestead of the said Joseph Hatfield, now occupied by Sarah D. Hatfield, his widow, a great number of times, to affiant's certain knowledge, and that the said Shumate was, at and before the 8th day of October, 1898, well aware that much of the said lands owned by the said Sarah D. Hatfiled and Nancy C. Browning was, and had been for a great number of years, cleared, fenced and in a state of cultivation, and that the mansion house of the said Joseph Hatfield and Sarah D. Hatfield is located thereon. That the said Shumate has pointed out a number of the corners to the said several tracts of land which composed the Hatfield body.

Affiant further says that during the years 1896 and 1897, he frequently saw V. A. Wilder, agent, and M. F. Stiles, attorney, for said King, passing up and down the said Ben creek and in so doing that they passed through the Joseph Hatfield farm, and by the mansion house located thereon. That they, the said Wilder and Stiles, were acquainted with

the several persons living on that creek, or, at least, knew where they lived, and especially were acquainted with Sarah D. Hatfield and her home.

Affiant further says that he was, in the year 1896, at the house of Sarah D. Hatfield on one occasion, when he found the said Wilder and Stiles stopping with Mrs. Hatfield, and that he left the house very late in the evening, leaving the said Wilder and Stiles at the house of Mrs. Hatfield, and that they came away therefrom the next morning.

Rev. A. M. Toler.

Taken, subscribed and sworn to, as witness my hand and seal this the 30th day of September, 1901.

[Seal County Court, Mingo County, West Virginia.]

Jas. Damron,
Clk. Mingo County Court.

EXHIBIT No. 11.

STATE OF WEST VIRGINIA, *Mingo County*, } *To wit:*

J. M. Toler, being duly sworn, says that he lives on Ben creek in said county, at a distance of about one mile from the residence of Sarah D. Hatfield. That he knows V. A. Wilder agent, and M. F. Stiles, attorney, for Henry C. King, and has been acquainted with them since about the year 1894. That said Wilder and Stiles, during the years 1895, 1896, and 1897, frequently passed up and down Ben creek along the public road, which is located through the Joseph Hatfield farm now occupied by Sarah D. Hatfield and her daughter, Nancy C. Browning, and that that portion of the farm located along the public road on each side thereof, is in a state of cultivation, and has been, to affiant's knowledge, for more than thirty years. That during the time last mentioned, affiant has frequently been at the house of Sarah D. Hatfield and has heard her, and those about her home, speak of the said Wilder and Stiles stopping with them over night and visiting them.

Affiant further says that the home of Sarah D. Hatfield consists of a large two-story farm-house, with a kitchen and dining-room in a separate building; a very large orchard; two large barns with corn-cribs and other outbuildings, surrounded by a meadow, and with rolling hill lands above and below on which various crops are raised for the support of the family. That this place was known and recognized by the citizens throughout the surrounding country for a great number of years, and to affiant's knowledge for more than thirty years, as one of the most attractive farms in the county of Logan, from which the present county of Mingo was formed, and that the farm aforesaid was and is such as to attract attention and cause inquiry as to its occupant and owner.

Affiant further says that H. K. Shumate, another attorney for the said Henry C. King, resided at Logan Court-house a number of years before the formation of Mingo county, in the year 1895, and since that time has lived and yet lives

at the county-seat of Mingo county, during which time he, the said Shumate, has spent much time on Ben creek and at the home of Joseph Hatfield and after his death, with his widow, and that the said Shumate purchased the minerals underlying the Hatfield land as agent for Henry R. Phillips, or some one of the trustees acting with him, and was, at and before the 8th day of October, 1898, thoroughly familiar with the Hatfield lands and their location.

J. M. TOLER.

Taken, subscribed and sworn to, as witness my hand and seal this the 30th day of September, 1901.

[Seal County Court, Mingo County, West Virginia.]

JAS. DAMRON,
Clk Mingo County Court.

EXHIBIT No. 12.

STATE OF WEST VIRGINIA, } *To wit:*
County of Mingo, }

Ferrell Hatfield being duly sworn upon his oath says that he is sixty-eight years old and resides on the left fork of Ben creek near where he was born and reared; that he was well acquainted with his uncle Aly Hatfield in his lifetime; that he is well acquainted with the lands of the said Aly situate on the left fork of Ben creek formerly in Logan but now Mingo county West Virginia and particularly with those portions of said lands now occupied and claimed by Sarah D. Hatfield and Nancy C. Browning formerly Hatfield; that he is also acquainted with the location of the three tracts of 48, 72 and 140 acres conveyed to Joseph Hatfield son of said Aly by the commissioner of school lands of Logan county that said tracts and the two surveys of 450 and 330 acres form one contiguous boundary. That a portion of the said 330 acres was conveyed by the said Aly to his daughter Martha Toler who occupied the same from about 1865 till her death about 1891 and her children and husband have occupied and resided thereon since her death till the present time. That said Aly resided on said lands from 1863 until his death in 1870 clearing enclosing and cultivating portions thereof including portions of the 450 and 330 acre tracts and upon his death the unsold portions were occupied and resided upon by his son Joseph until his death in 1893 who cleared and enclosed other portions thereof and his widow Sarah D and daughter Nancy C. have since continued to occupy and enclose portions of the said 450 and 330 acre tracts, that portions of said 450 and 330 acre tracts have been enclosed and occupied continuously under said patents for more than thirty years.

FERREL HATFIELD.

Taken subscribed and sworn to before me this September 13th, 1901.

M. A. HATFIELD, *Justice.*

STATE OF WEST VIRGINIA, }
County of Mingo, } *To wit:*

I, James Damron, clerk of the county court, which is a court of record in and for the county and State aforesaid, do certify that M. A. Hatfield whose name is signed to the foregoing writing was on the 13th day of September, 1901, a justice of the peace (duly qualified) in and for the county and State last mentioned, and that he is authorized under the laws of my said State, to administer an oath. I further certify that I am acquainted with his signature and that his signature as signed to the foregoing writing is genuine.

Given under my hand and official seal this 16th day of Sept., 1901.

[Seal County Court, Mingo County, West Virginia.]

JAMES DAMRON, *Clerk.*

EXHIBIT No. 13.

STATE OF WEST VIRGINIA, *County of Cabell,* } *To wit:*

Claude L. Gaujot, being first duly sworn, says, that he is thirty years of age and resides at Williamson, Mingo county, West Virginia, that he is by profession and occupation, a civil and mining engineer and land surveyor; that he was acquainted with the late Joseph Hatfield in his lifetime, and is acquainted with his widow, Sarah D. Hatfield, and his daughter, Nancy C. Browning; that on or about the 15th day of October, 1889, the said Joseph Hatfield and Sarah D. Hatfield, his wife, made a deed purporting to convey to one Henry R. Phillips, trustee, all the coal, gases, salt water, oil and minerals of every description in, upon and under a certain tract of land, situate on the left fork of Ben creek, then in Logan county, but now in Mingo county, West Virginia, and therein described by metes and bounds. Said deed was recorded in the clerk's office of the county court of said Logan county, on the 6th day of August, 1890, in Deed Book Big P, at page 6. A copy of said deed is hereto attached as part hereof.

That affiant, with the assistance of his brother, J. E. Gaujot, surveyed the boundary of land so described in said deed, and ascertained that said metes and bounds embrace only 1,342.43 acres and not 1,700 acres as mentioned in said deed. That said deed embraces the whole of a tract described as containing 450 acres and a part of a 330 acres, granted by the Commonwealth of Virginia to Aly Hatfield on the first day of February, 1859. Said metes and bounds also embrace the tract of 140 acres granted to said Joseph Hatfield by L. D. Chambers, commissioner of school lands of said Logan county on the 14th day of March, 1889. Said metes and bounds also embrace certain other surveys. That affiant made a plat of such surveying, showing the location of each tract so embraced in said metes and bounds, and a correct tracing of the said plat or map is hereto attached as part of this affidavit.

That said surveying was done in 1894, and at that time,

several portions of the 450-acre tract and portions of the part of the 330-acre tract were then embraced in said deed, were then cleared and enclosed, and, from appearances, affiant would judge, had been cleared and enclosed a number of years before; and said lands were at that time in the actual occupation of the widow Sarah D. Hatfield and her daughter, Nancy; that all the lands described in said deed from said Joseph Hatfield and wife, Sarah D., to said Henry R. Phillips, trustee, form one contiguous boundary, and they have been resided upon and portions thereof cleared, enclosed and cultivated by the said Sarah D. Hatfield and her daughter since the time of said surveying in 1894.

CLAUDE L. GAUJOT.

Subscribed and sworn to before me in my said county this the 26th day of September, 1901.

C. W. CAMPBELL,
Notary Public, Cabell County, West Virginia.

STATE OF WEST VIRGINIA:

CABELL COUNTY COURT CLERK'S OFFICE.

I, F. L. Doolittle, clerk of the county court of Cabell county, in the State aforesaid, do hereby certify that C. W. Campbell, whose name is signed to the annexed certificate, bearing date the 26th day of September, 1901, is a notary public in and for said county, duly commissioned and qualified, and is authorized by the laws of this State to take the acknowledgment of deeds and other writings, to administer oaths, and to take affidavits; and that the name thereto subscribed is, I verily believe, his genuine signature.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at the court-house of said county, this 28th day of September, 1901.

[Seal County Court, Cabell County, West Virginia.]

F. L. DOOLITTLE,
Clerk Cabell County Court.

This deed, made this 15th day of October, A. D. 1889, between Joseph Hatfield and Sarah Hatfield his wife parties of the first part, and Henry R. Phillips, trustee and assignee of R. S. Lowery's personal representative, party of the second part:

Witnesseth, that for and in consideration of the sum of eighteen hundred dollars paid in hand, the receipt whereof is hereby acknowledged, the said parties of the first part do grant unto the party of the second part, with covenants of general warranty, the following-described property, to wit: All the coal, gases, salt water, oil and minerals of every description, in, upon and under my farm or tract of land, situated in the county of Logan State of West Virginia on the waters of left fork of Ben creek containing one thousand and seven hundred acres, and bounded as follows: Beginning at two beeches on the bank of the left-hand fork of Ben creek near an old mill and corner to a survey of 79 acres made for Thos. E. & Jno. R. Browning and with one line of the same S. 7½° W. 134 poles to a beech and white oak (both gone) corner to a survey of 66 acres made for Wm. Smith, thence with the same S. 87° W. 7 poles to a lynn dogwood and birch (lynn and dogwood gone), N. 57° W. 100 poles to a white oak on a hillside, N. 81° W. 260 poles to a maple and bunch of lynns, S. 85° W. 84 poles to a chestnut oak, S. 46° W. 56 poles to a large black walnut (cut down), S. 6½° E. 16 poles to a bunch of lynns S. 65½° E. 16 poles to a chestnut and two dogwoods in a drain, N. 15° W. 10 poles to a poplar, dogwood and sugar, N. 68° E. 56 poles to a bunch of lynns, S. 74° E. 40 poles to a bunch of lynns, on a point, S. 6° E. 66 poles to a hickory and dogwood S. 31½° E. 22 poles to a birch and white walnut (both down) corner to a survey of 72 acres made by Aly Hatfield and with the same, N. 87° W. 68 poles to a white oak, S. 46½° W. 38 poles to two lynns and a black walnut (one lynn gone and black walnut down), at the foot of the mountain where road crosses to Beech creek, S. 84° E. 24 poles to a maple and beech on a point, S. 21° E. 14 poles to a poplar near a branch, N. 56° E. 20 poles to a birch on the road fork, S. 14° E. 176 poles to a poplar on the point, S. 44½° E. 20 poles to two lynns on the right-hand fork, N. 35° E. 18 poles to a poplar on a point, N. 80° E. 18 poles to a beech, N. 10° W. 28 poles to an ironwood and lynn at the forks of said fork, N. 41° E. 30 poles to a buckeye on bank of said fork (cut down), N. 15° W. 5

poles to a beech (cut down) at mouth of Alum fork and corner to said Smith survey and with one line of same, S. 64½° E. 30 poles to two birches (gone) corner to Wm. Mullin's 420-acre survey and with same, S. 37° W. 100 poles to two rocks and chestnut oak on a high point, S. 10° E. 112 poles to a hickory and locust on the ridge at the head of Alum creek on a line of said Mullin's survey and leaving the same and down the point above Chestnut Log hollow, between said Hatfield and A. M. Toler, N. 85° E. 148 poles to a bunch of chestnuts on a point, S. 40° E. 70 poles to a chestnut oak (not found) S. 53° E. 38 poles to a maple, S. 81° E. 42 poles to a beech S. 64° E. 10 poles to a large sycamore in the bottom just above Chestnut Log hollow, due east 147 poles to a hickory and black oak on the ridge between the two forks of Ben creek, N. 69° E. 24 poles to a bunch of small chestnuts, N. 2° W. 58 poles to a chestnut oak N. 45° W. 38 poles to a high knob, N. 27° E. 116 poles to a stake on the line of W. Alderson's 2,740-acre survey and with said line N. 10½° W. 136 poles to a chestnut, corner to said survey and leaving same, N. 66° W. 20 poles to a water oak, N. 33° W. 56 poles to two hickories on the side of a knob corner to said Hatfield's school-land survey, N. 30° E. 66 poles to a stake on Alderson's line and with it, N. 5° W. 292 poles to a blazed black oak on the line of said school-land survey and with it, N. 51° W. 20 poles to a chestnut oak on top of the ridge, S. 34° W. 64 poles to a poplar on a branch, S. 13° W. 24 poles to a beech, S. 52° W. 18 poles to a gum in a hollow, and leaving said school-land survey, S. 18° W. 40 poles to a buckeye and cucumber, S. 17° E. 10 poles to the beginning. Reserving however from the effects of this conveyance, the following two tracts or boundaries—1st. Beginning at a beech on the east side of Hurricane branch of the left fork of Ben creek, near the upper end of Smith 66-acre survey, thence up a drain, N. 82° E 20 poles to a chestnut, S. 6° W. 22 poles to a white oak, S. 50° W. 22 poles to three beeches, on bank of branch, N. 11° W. 8 poles to a white oak, N. 3° W. 21 poles to the beginning, containing 3⅗ acres. 2nd. Beginning at a beech on left fk. of Ben — at the mouth of a small drain about 60 rods above said Hatfield's house, thence S. 36° E. 48 poles to a beech on a point, S. 65° E. 32 poles to small crooked sugar, S. 57° E. 24 poles to a white oak, S. 41° E. 8 poles to a gum, S. 38° E. 12 poles to a lynn, S. 11° E. 14 poles to a white oak, S. 22° E. 37 poles to a dogwood,

buckeye, elm, & birch, & up the creek, N. 38° E. 14 poles, N. 15° E. 32 poles, to wahoo sprouts, N. 20° W. 68 poles to a cliff, N. 79° W. 100 poles to the beginning, containing 31 acres. Together with the full and complete rights and privileges of every kind for mining, manufacturing and transporting such coal, gases, salt water, oil and minerals on, through and over the said premises, and in particular the right of exploring for and extracting the said minerals.

And also with full rights of way to, from and over said premises by the construction and use of roads, tramways, railroads or otherwise, for the purpose of exploring, extracting, storeing, handling, manufacturing, refining, shipping or transporting all said minerals, whether contained on the said premises or elsewhere, and for any other purpose whatsoever, and with the full right to take and use all water, stone and timber, except walnut, ash, poplar and oak over 16 inches in diameter, found on said premises required for any of the above purposes; provided, however, that the said parties of the first part shall have the right to take for themselves such coal as they may need for the domestic use of their own family so long as they shall remain on the said premises; or, in case said coal cannot be taken without inconvenience to the mining operations of the party of the second part, then the same shall be delivered by and received from said party of the second part free of charge. Also there is granted a right over and across the reservations herein mentioned for roads, tramways, railroads, or otherwise for transport-ion of any of the minerals and substances above mentioned to the same extent granted over other lands.

Witness the following signatures and seals the day and date first above written.

JOSEPH HATFIELD. [SEAL.]
SARAH D. HATFIELD. [SEAL.]

STATE OF WEST VIRGINIA, }
Logan County, } *ss:*

I, Charles M. Turley, a notary public in and for the county and State aforesaid, do certify that Joseph Hatfield, whose name is signed to the writing above, bearing date on the — day of October, 1889, has this day acknowledged the same before me in my said county.

Given under my hand this 27th day of December, 1889.

C. M. TURLEY,
Notary Public.

STATE OF WEST VIRGINIA, }
Logan County, } *ss:*

I, M. A. Ferrell, a justice of the peace in and for the county and State aforesaid, do certify that Sarah D. Hatfield the wife of Joseph Hatfield, whose names *are* signed to the above writing, bearing date on the — day of October, 1890, this day personally appeared before me, in the county aforesaid, and being examined by me privily and apart from her husband, and having the said writing fully explained to her, she the said Sarah D. Hatfield acknowledged the said writing to be her act, and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 25th day of July, 1890.

M. A. FERRELL, *Justice.*

STATE OF WEST VIRGINIA:

In the Clerk's Office of the County Court of Logan County.

This deed from Joseph Hatfield & wife to Henry R. Phillips, trustee, bearing date the 15th day of October, 1889, was this day presented to me, clerk of said court, and the same, together with the certificate of acknowledgment thereon endorsed, is admitted to record in my office aforesaid.

Given under my hand this 6th day of August 1890.

Teste:

S. S. ALTIZER,
Clerk of County Court.

[Endorsed:] Joseph Hatfield & wife to Henry R. Phillips, trustee, &c. Dated 15 Oct. 1889. Received for record this 6th day of Aug. 1890. S. S. Altizer clerk. Recorded in Deed Book Big P, page 6. S. S. Altizer clerk.

EXHIBIT No. 14.

STATE OF WEST VIRGINIA, } *To wit:*
County of Logan, }

This day personally appeared before the undersigned authority William Claypool, who upon oath states that about six years ago Attorney H. K. Shumate and one Col. Wilder, who claimed to be an agent for one H. C. King, who was claiming title to a tract of 500,000 acres of land situate partly in the counties of Logan, Wyoming and McDowell, West Virginia, came to this affiant, at his home, on Huff's creek, in said county of Logan, and stated that the said Henry C. King had instituted or was about to institute an action at law or suit in equity, or desired to do so, against affiant and one Sarah D. Hatfield, who was then as well as now residing on Ben creek, formerly Logan, now Mingo county, West Virginia, and others, for the purpose of ousting this affiant, the said Sarah D. Hatfield and others of certain tracts of land occupied and claimed by them under title adverse to the title of the said King to the said 500,000-acre tract, and within what was claimed by the said Henry C. King to be the true exterior boundary lines of the said 500,000-acre tract.

That the said Col. Wilder and the said Attorney H. K. Shumate requested this affiant to allow the said Henry C. King to represent or have represented the said affiant in said action or suit as had been or was expected to be brought against affiant involving the title to his lands in said Logan county, promising said affiant that he should be at no expense in employing counsel to defend his interest therein, or in paying any of the expenses attending the defense of said action or suit, all of which was to be looked after and paid by the said Henry C. King; and that no matter what was the result of said action or suit, when finally determined, that affiant would be fully protected from the consequences thereof, and in no event would affiant lose his said real estate, even though the decision of the courts should be adverse to this affiant. That as affiant understood it at that time, said action or suit had been or was expected to be

brought in the United States district court for the district of West Virginia. That the said Col. Wilder told this affiant that he could gain said land in said action by bribery, but that he did not desire to resort to said means to gain said lands in said action or suit. Affiant further states that he never saw one Henry C. Flesher, an attorney, in regard to looking after his interest in said action or suit, and never employed him as his attorney in said action or suit, nor did he ever employ him in any capacity. Affiant further states that he did not employ said attorney H. K. Shumate to defend or protect his interests in said action or suit.

WILLIAM CLAYPOOL.

Subscribed and sworn to before me this 18th day of February, 1901.

BRUCE MCDONALD,
Notary Public in and for Logan County,
West Virginia.

STATE OF WEST VIRGINIA,
Logan County Court Clerk's Office, } *To wit:*

I, S. S. Altizer clerk of the county court of said county hereby certify that Bruce McDonald whose name is signed to the foregoing writing bearing date February 18th, 1901, was at the time of signing the same a notary public within and for the county and State aforesaid, duly commissioned and qualified as such, and that his signature thereto is genuine, and that all his acts as such notary public are entitled to full faith and credit.

Given under my hand and the seal of said court, this 23rd day of February, 1901.

[Seal County Court Logan County, West Virginia.]

S. S. ALTIZER, *Clerk.*

EXHIBIT No. 15.

STATE OF WEST VIRGINIA, } *To wit:*
County of Logan, }

This day personally appeared before the undersigned authority, Amanda Claypool, who upon oath states that she is the wife of William Claypool, who has this day made affidavit in regard to a proposition made him by one Col. Wilder and Attorney H. K. Shumate for one Henry C. King. Affiant further states that she was at her home with her said husband about six years ago when the said Col. Wilder and H. K. Shumate came to affiant's home.

That she has just heard read the affidavit of William Claypool, and was present at the time and place mentioned therein, and heard the conversation between the said Col. Wilder, H. K. Shumate and William Claypool, and that affiant understood the said conversation to be the same as detailed by William Claypool in his affidavit.

AMANDA CLAYPOOL.

Subscribed and sworn to before me this 18th day of February, 1901.

BRUCE McDONALD,
Notary Public in and for Logan County,
West Virginia.

STATE OF WEST VIRGINIA, } *To wit:*
Logan County Court Clerk's Office, }

I, S. S. Altizer, clerk of the county court of said county, hereby certify that Bruce McDonald whose name is signed to the foregoing writing bearing date February 18th, 1901, was at the time of signing the same a notary public within and for the county and State aforesaid, duly commissioned and qualified as such notary public and that all his acts as such are entitled to full faith and credit.

Given under my hand and the seal of said court this 23rd day of February, 1901.

[Seal County Court, Logan County, West Virginia.]

S. S. ALTIZER, *Clerk.*

EXHIBIT No. 16.

UNITED STATES OF AMERICA, }
Southern District of West Virginia, } ss:

I, Edwin M. Keatley, clerk of the circuit court of the United States for the southern district of West Virginia, and as such clerk custodian of the records of the circuit court of the United States for the district of West Virginia sitting at Charleston previous to July 1st 1901, do certify that I have made a careful search among the records and papers in my office and I am unable to find the papers in the case of Henry C. King *vs.* S. S. Altizer *et als.* in ejectment, and that there is no receipt on file for said papers; and that so far as this office shows the papers in said cause are mislaid or lost.

In testimony whereof I hereto set my hand and the seal of said court at Charleston in said district this 14th day of October A. D. 1901, and in the 126th year of the Independence of the United States of America.

{ Seal Circuit Court United States, Southern District West Virginia, Charleston, West Va. }

EDWIN M. KEATLEY,
Clerk C. C. U. S., S. D. W. Va.

EXHIBIT No. 17.

UNITED STATES OF AMERICA, } ss:
Southern District of West Virginia, }

I, Edwin M. Keatley, clerk of the circuit court of the United States for the southern district of West Virginia, and as such clerk having in my custody the records of the circuit court of the United States of the former district of West Virginia, sitting at Charleston, including the law and chancery order books, do hereby certify that I have carefully examined the law and chancery order books in my custody, from the time of entry of the final decree of the 2nd day of June 1900 in the equity cause styled Henry C. King *vs.* S. D. Hatfield *et al.* and I find no decree or order whatsoever upon the said books filing any petition for an appeal from said final decree, or any order or decree allowing an appeal therefrom or approving any appeal bond.

In testimony whereof I hereto set my hand and the seal of said court at Charleston, in said district, this 7th day of October, A. D. 1901, and in the 126 year of the Independence of the United States of America.

{ Seal Circuit Court United States, Southern District West Virginia, Charleston, West Va. }

EDWIN M. KEATLEY,
Clerk C. C. U. S., S. D. W. Va.

EXHIBIT No. 18.

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia hereby certify that the file of papers in the ejectment suit of H. C. King *vs.* S. Altizer & others, was sent from the office at Parkersburg to the office of this court at Charleston, or to one of the attorneys in the case, and have so far as this office is concerned been mislaid or lost.

L. B. DELLICKER, *Clerk.*

Parkersburg Oct. 5th 1901.

EXHIBIT No. 19.

Bill of Complaint & Exhibits.

The bill of complaint of Z. T. Vinson, receiver of Alexander McClintock, against Henry C. King and J. R. Robertson, commissioner of school lands of Wyoming county, filed in the circuit court of Wyoming county, West Va.

The plaintiff complains and says that on the — day of September 1893, by a decree of the circuit court of the United States for the district of West Virginia entered in the chancery cause of Fontaine Bros. *vs.* Alexander McClintock *et al.* then pending in said court he was appointed receiver of all the property, both real and personal, of the said Alexander McClintock situate in the State of West Virginia, and that as such receiver he gave bond and qualified and took possession of said property according to the terms of said decree, and has been from the date thereof until now, and is still acting *acting* under said decree as such receiver. A duly certified copy of said decree is filed herewith as a part hereof, and marked Exhibit "A." That at the date of said appointment the said Alexander McClintock was the owner in fee-simple of a part of what was then and is now known as the De Witt Clinton survey of 142,000 acres of land, situate in said State, and lying partly within the county of Logan, that the said tract of land was granted by the Commonwealth of Virginia to the said De Witt Clinton, as assignee of William Duval, on the 19th day of February, 1796, and that the said McClintock, regularly, derived his said title thereto from the said De Witt Clinton, by sundry conveyances from the said De Witt Clinton and his grantees, all of which will more fully appear from duly certified copies of said conveyances that will be filed herewith in due time as part of this bill, and marked "Exhibits No. 1 to No. — inclusive."

That your complainant under and by virtue of the decree aforesaid appointing him receiver as aforesaid, and for the purposes of said decree, was and is now the owner of said land.

That on the 7th day of May, 1894, the State of West Vir-

ginia, instituted a suit in chancery in the circuit court of Wyoming county in said State against Henry C. King *et al.* for the purpose of subjecting to sale for the benefit of the school fund so much of a 500,000-acres tract of land as lies in the counties of Wyoming, Logan, Mingo and McDowell, West Virginia, forfeited to the State of West Virginia, and not redeemed, released or otherwise disposed of, by the failure of the owners of the same to have each of such parts of said 500,000-acre tract as lies in the counties aforesaid, entered upon the land books of the county in which it is situated, and assessed with State taxes thereon for more than five successive years from the year 1883 to the year 1894, inclusive, which said tract was known as the Rob't Morris survey and was granted to the said Robert Morris by the Commonwealth of Virginia on the 23d day of June, 1795, all of which will more fully appear from a duly certified copy of the record of said suit, filed herewith as a part hereof and marked "Exhibit B." That the said Henry C. King filed his answer in said suit, alleging himself to be the legal and equitable owner of the whole of the said 500,000-acre tract by title regularly derived by mesne conveyances from the said Rob't Morris, alleging that the same had been redeemed by his predecessors in pursuance of a decree entered by the circuit court of Wyoming county in the year 1883, and that the same had not since been legally forfeited, but offering to redeem the same in the event such forfeiture should be held to be valid. All of which will more fully appear from "Exhibit B" hereinafter referred to.

That Alexander McClintock likewise appeared and filed his petition in said suit wherein he alleged his ownership as aforesaid of the said De Witt Clinton 142,000-acre tract, and denied the ownership of the 500,000-acre tract by the said Henry C. King, and denied his right to redeem the same. Which said answer will more fully appear by reference to "Exhibit B" hereinbefore referred to. That subsequently, that is to say on the — day of March, 1895, and while the said suit in chancery was still pending in the circuit court of Wyoming county as aforesaid and before any decree of redemption of the 500,000-acre tract had been entered therein the said Henry C. King instituted an action of ejectment in the circuit court of the United States for the district of West Virginia, for the recovery of the said 500,000-acre tract of land against S. S. Altizer *et al.* That the said Alexander

McClintock, John McClintock and M. B. Mullins were parties defendant to said action of ejectment. That the plaintiff therein Henry C. King was permitted by the court to select said last-named defendants as the ones against whom he would first try his action of ejectment, and that said action was tried against them, and ended in a verdict and judgment in favor of the said Alexander McClintock, John McClintock and M. B. Mullens and against the said Henry C. King which said judgment was entered on the 27th day of February, 1896, by the circuit court of the United States at Parkersburg.

The complainant further says that the land sought to be recovered by the said Henry C. King in said action of ejectment of the said Alexander McClintock, John McClintock and M. B. Mullens was a part of the De Witt Clinton survey of 142,000 acres hereinbefore described, and that it was and is a part of the land sought to be redeemed by the said Henry C. King in the chancery suit hereinbefore described as pending in the circuit court of Wyoming county. That the ground upon which said action of ejectment was defeated wholly—because it appeared at the trial thereof that the title of the said Henry C. King to the 500,000-acre tract had been forfeited and had not been redeemed released or relieved therefrom in any manner, shape or form. All of which will more fully appear from a duly certified transcript of said action of ejectment filed as a part hereof marked "Exhibit C."

That subsequently that is to say on the — day of ——, 1896, the said Henry C. King procured a writ of error to the judgment aforesaid in the action of ejectment for the purpose of reviewing the same in the Supreme Court of the United States, and that such action is now pending in said last-named court upon said writ.

That after the procurement of said writ of error and pending the same *a written stipulation was entered into by and between M. F. Stiles the counsel of record for the said Henry C. King, both in the redemption proceeding then pending as aforesaid in the circuit court of Wyoming county and in the action of ejectment aforesaid in the circuit court of the United States, as well as in the Supreme Court of the United States in the same, and John A. Sheppard who was counsel for and representing Alexander McClintock, both in said action of ejectment and said proceeding in the circuit court of Wyoming county, whereby it*

was agreed that the said suit aforesaid pending in the circuit court of Wyoming county should be continued by the court and commissioner before whom the same was then pending, and no steps taken therein until the case of King vs. Mullins and McClintock which was the action of ejectment aforesaid should be decided by the Supreme Court of the United States, said stipulation was and is in the words and figures following, to wit:

In the Circuit Court of West Virginia for the County of Wyoming.

STATE OF WEST VIRGINIA
vs.
HENRY C. KING ET AL. } In Chancery.

It is hereby agreed by the parties represented by the undersigned counsel, that the above-styled cause shall be continued by the court and commissioner before whom the same is now pending, until the case of King *vs.* Mullins and McClintock shall be decided by the Supreme Court of the United States, which case is to be submitted upon briefs within the first ninety days of the present term of said Supreme Court; but if said court should require oral argument in addition to the briefs and should not decide said case upon such submission, then this cause shall not be continued after the refusal of said court to decide said cause, by reason of this stipulation but shall be proceeded with according to the rules governing such cases.

(Signed) M. F. STILES,
M. F. STILES,
Of Counsel for Henry C. King.
JOHN A. SHEPPARD,
Of Counsel for Alexander McClintock.

That the said case of King *vs.* Mullins and McClintock was, pursuant to said stipulation, submitted upon briefs within the first ninety days of the term of the Supreme Court of the United States mentioned in said stipulation and said Supreme Court did not require oral argument in addition to said briefs, but took said case under consideration and the same is now submitted and pending and undecided before said court. That at the time said stipulation was entered into one J. R. Robertson was the commissioner to

whom said cause had been referred by the circuit court of Wyoming county, and before whom it was then pending; that he was immediately notified of said stipulation and the agreement of said parties; that subsequently he resigned as such commissioner and one D. A. Robertson was appointed in his place, which said last-named commissioner likewise had full notice and knowledge of said stipulation.

That at the September term 1897, *notwithstanding said stipulation and in violation thereof, without notice to this complainant or to the said Alexander McClintock, or to the said John A. Sheppard, his counsel, and after the submission of the said case of King vs. McClintock and Mullins to the Supreme Court of the United States upon written briefs and before the decision of the same the said Henry C. King through his counsel M. F. Stiles procured a report of the commissioner D. A. Robertson last named in the said chancery cause of The State of West Virginia vs. Henry C. King et al. and prepared and caused to be entered in said cause by the circuit court of Wyoming county a decree of redemption by the said Henry C. King of such portion of the* 500,000 *acres tract of land as lies in the State of West Virginia.*

Said decree recites the payment by the said Henry C. King to the commissioner of school lands of Wyoming county of all costs, taxes and interests chargeable upon said land up to and including the year 1897, fixes the boundary of said land as contended for by the said King and in accordance with the map and survey made thereof by one Sell, adjudges that none of the other defendants in said proceeding has any interest in said land and adjudges, orders and decrees that the same is redeemed by the said King in accordance with the recitals of said decree. A certified copy of said decree is filed herewith as a part hereof marked "Exhibit D."

The complainant further says that a part of the said De Witt Clinton survey of 142,000 acres is embraced by the said survey of 500,000 acres as surveyed by the said Sells, and as redeemed by the decree aforesaid; that said decree, if permitted to stand, will be to his great prejudice and wrong; that the same was procured and entered without his knowledge in violation of his rights, in rank violation of the stipulation hereinbefore set out, and through the schemes, deceit and fraud, as aforesaid, of the said Henry C. King. The plaintiff therefore prays that Henry C. King

and J. R. Robertson, the commissioner of school lands for the county of Wyoming be made parties defendant hereto, and that process issue against them; that said decree of redemption may be set aside, cancelled and held for naught; that the said J. R. Robertson, commissioner of school lands as aforesaid may be enjoined from paying over to the State or disposing of in any way, in whole or in part of the money paid to him by the said Henry C. King in said decree of redemption, and that the said Henry C. King be enjoined and inhibited from taking advantage in any way of his said decree of redemption and for such further and general relief as the court may see fit to grant, and your complainant will ever pray and so forth.

Z. T. Vinson,
Receiver of Alexander McClintock, by Counsel.

State of West Virginia, }
Mingo County, } *To wit:*

John A. Sheppard, of counsel for the plaintiff herein, being duly sworn, says that he has read and is familiar with the allegations in the foregoing bill, and that the facts and allegations therein contained are true except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information he believes them to be true.

John A. Sheppard.

Taken, sworn to and subscribed before me this 20th day of October, 1897.

Wills Goodykoontz.

Wm. R. Thompson,
Campbell, Holt & Campbell,
Jno. A. Sheppard,
Counsel for Pl'ff.

United States of America, }
District of West Virginia, } *ss:*

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true copy of the bill of complaint in the case of Z. T. Vinson, receiver of Alexander McClintock

vs. Henry C. King *et al.* in chancery, as appears from a transcript of record from the circuit court of Wyoming county, W. Va., on file in my office with the papers in said cause.

In testimony whereof I have hereunto set my hand and the seal of said court this 11th day of February, A. D. 1901 and in the 125th year of the Independence of the United States of America.

(Seal Circuit Court, United States District, West Virginia; Charleston, West Va.)

L. B. Dellicker, *Clerk.*

Order in Vacation.

West Virginia:

In Vacation of the Circuit Court of Wyoming County, this the 21st Day of October, 1897, at Davy, W. Va.

Z. T. Vinson, Receiver, Plaintiff, *vs.* Henry C. King et al., Defendants. } In Chancery.

This day Z. T. Vinson, receiver of Alexander McClintock, presented to the judge of the circuit court of Wyoming county, in vacation, his bill praying an injunction against J. R. Robertson, commissioner of school lands of Wyoming county, and Henry C. King; and the said judge having seen said bill, and maturely considered thereof, is of opinion to grant said injunction. It is therefore adjudged, ordered and decreed that the said J. R. Robertson, commissioner of school lands of the said Wyoming county, be enjoined, restrained and inhibited from paying out to any person or for any purpose any money received, or which may be hereafter received by him, from the said Henry C. King, or any other person, for the redemption of the land described in the decree made at the September term, 1897, of the circuit court of Wyoming county, in the case of The State of West Virginia *vs.* Henry C. King *et al.* pending in said court until the further order of this court. And it is further adjudged, ordered and decreed that Henry C. King, and all persons claiming under him, their agents and attorneys, be, and they are, hereby enjoined, restrained and inhibited from

taking advantage in any way of said decree of redemption, made at the September term, 1897, of the circuit court of Wyoming county in the case last aforesaid. But this injunction shall not take effect until the plaintiff or some one for him, shall execute a bond in the penalty of $500.00 with security to be approved by said clerk, and to pay all costs and damages that may be awarded against the plaintiff, or result to any one by reason of said injunction, in case the same be dissolved.

JOSEPH M. SANDERS,
Judge of the Circuit Court of Wyoming Co., W. Va.

To the clerk of the circuit court of Wyoming county, West Virginia,

J. M. S.

STATE OF WEST VIRGINIA, }
County of Wyoming, } *To wit:*

I, E. M. Senter, clerk of the circuit court of Wyoming county, West Virginia, do hereby certify that the foregoing writing is a true copy of the injunction granted by Joseph M. Sanders, judge of the circuit court of Wyoming county, West Virginia, on the 21st day of October, 1897, and I further certify that the bond required to be given in said injunction has been given conditioned according to the terms of the injunction and approved by me.

Given under my hand this the 29th day of October, 1897.

E. M. SENTER, *Clerk.*

(Endorsement of sheriff.)

Executed by delivering to the within-named J. R. Robertson an office copy of the within summons, and order of injunction on the 29th day of October 1897, at 4 o'clock p. m.

D. J. COOK, *Dept.*,
For B. P. COOK, *S. W. C.*

Henry C. King not found within my bailiwick, this Nov. 1st, 1897.

D. J. COOK, *Dept.*,
For B. P. COOK, *S. W. C.*

UNITED STATES OF AMERICA, }
District of West Virginia, } ss:

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true copy of a restraining order duly entered in the chancery cause of Z. T. Vinson, receiver of Alexander McClintock *vs.* Henry C. King and J. R. Robertson, commissioner of school lands of Wyoming county, West Virginia, in the circuit court of Wyoming county, West Virginia, as appears from a transcript of the record of said cause from said court on file in my office, said cause having been removed from said circuit court of Wyoming county into the circuit court of the United States for the district of West Virginia, aforesaid.

In testimony whereof I have hereunto set my hand and the seal of said court this 11th day of February, A. D. 1901, and in the 125th year of the Independence of the United States of America.

{ Seal Circuit Court, United States District, }
{ West Virginia: Charleston, West Va. }

L. B. DELLICKER, *Clerk.*

EXHIBIT No. 20.

At a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg, in said district, on the 2d day of July, 1895, the following order was made and entered of record, to wit:

HENRY C. KING
vs.
SIMON ALTIZER ET AL. } In Ejectment.

On this 28th day of June, 1895, comes William Claypool, who is one of the defendants in the said action of ejectment by his attorneys W. E. Chilton, John A. Sheppard and Jno. A. Hutchinson and filed the affidavits of himself and B. M. Mullins, which are made part of this order, and moved the court for a rule against Henry C. Flesher to show cause, if any he can, by what authority he signed his name as attorney for said William Claypool to the alleged agreement of facts in this action bearing date June 15th, 1895, and by what authority he signed the name of said Claypool to said agreement of facts, and at whose instance and request he has so done; and said Claypool also moved the court for a rule against the said Henry C. Shumate, V. A. Wilder and H. K. Shumate to show cause, if any they can, why they should not be fined and attached for their contempt to us offered in attempting and conspiring to impose upon this court a false and fraudulent agreement of facts in the said action, as to an agreed case, and thereby to deceive the court and to pervert the course of justice therein, and to the injury of said Claypool and others, parties defendant in said action, and others materially interested with the defendants in the determination of the question presented in said false and fraudulent agreement of June 15th, 1895; and said Claypool also moved the court for a rule against the said Henry C. Flesher and H. K. Shumate, who are attorneys of this court, to show cause why they should not be disbarred from practice in this court by reason of the matters set forth in said affidavits.

And thereupon the court doth order that the rule against

the said Henry C. Flesher first above prayed for be issued, returnable on the 4th day of September, 1895. And the court doth refuse to award rules against Flesher, Wilder & Shumate as last above prayed for.

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, hereby certify that the foregoing is a true copy of an order entered of record in said court on the 2d day of July, 1895, in the ejectment case of H. C. King *v.* Simon Altizer, *et al.*, therein pending. And I further certify that the records of my said office, at Parkersburg, fail to show that the rule hereinabove awarded has been disposed of to this date.

Given under my hand, and seal of said court, at Parkersburg, in said district, this 5th day of February, 1901.

{ Seal Circuit Court United States, District West Virginia, Parkersburg, West Va. }

L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va.

EXHIBIT No. 21.

Know all men by these presents that I Nancy C. Browning formerly Nancy C. Rutherford of Mingo county West Virginia do hereby retain authorize and empower W. P. Hubbard Esq. of Wheeling Hon. E. P. Rucker of Welch, C. W. Campbell of Huntington and Jno. A. Sheppard of Williamson and all of West Virginia to appear for and represent me in that certain cause of Henry C. King against Sarah D. Hatfield and Nancy C. Rutherford now pending on appeal in the Supreme Court of the United States under the style of Sarah D. Hatfield and Nancy C. Rutherford against Henry C. King. And I do hereby empower authorize and direct my said attorneys to do for me and in my defense in said cause such things and take such steps therein as they may be advised is proper and necessary to protect my interest.

Given under my hand this 13th day of September 1901.

NANCY C. BROWNING.

Acknowledged before the subscriber Sept. 13th 1901.

M. A. HATFIELD, *Justice.*

EXHIBIT No. 22.

STATE OF WEST VIRGINIA, } *To wit:*
County of Cabell, }

John A. Sheppard, being first duly sworn, upon oath, says: That about the first of February, 1901, he, together with C. W. Campbell, examined the clerk's office of the United States circuit court for the district of West Virginia at Parkersburg, for the purpose of finding an agreed statement of facts purporting to have been made between Henry C. King of the one part and Sarah D. Hatfield, Nancy C. Rutherford and William Chapool of the other part, the latter three of whose names were signed thereto by Henry C. Flesher as attorney, which agreed statement of facts, dated June 15, 1895, was filed in said clerk's office at Parkersburg in the case of Henry C. King against Simon S. Altizer and others; that during such examination they were aided by Col. L. E. Dellicker, clerk of the circuit court of the United States for the district of West Virginia; that they failed to find said agreed statement of facts, and that the whole file of the said case of King against Altizer was missing. Affiant was informed by said clerk that the whole of the said file of papers had been sent to the clerk's office at Charleston, West Virginia.

Affiant further says that he went to the office of the clerk of the circuit court of the United States at Charleston and made inquiry of J. T. Watters, the then acting deputy clerk, as to the whereabouts of said file, and was informed by said deputy clerk that he had some recollection of a large file of papers being received at his office from Parkersburg during a term of court, which he thought was the file of King against Altizer and others; that said clerk, Col. Dellicker, came into the office at Charleston and asked said deputy clerk if a file of papers had come from Parkersburg, and, being informed that they had, said clerk directed his said deputy to turn the same over to Col. E. L. Butterick, which the said deputy informed affiant he did. Affiant was unable to find any of the file of papers, or the agreed statement of facts referred to, in the clerk's office at Charleston.

The said deputy clerk, Watters, then caused inquiry to be made of Col. Butterick, and affiant was informed that said Butterick claimed that he did not have the papers or the agreed statement of facts and knew nothing of their whereabouts. Affiant also went to the office occupied by said Butterick and M. F. Stiles, who was the attorney for Henry C. King, and made inquiry of his stenographer and of said Stiles as to the whereabouts of said agreed statement of facts and file of papers, but was informed that they were not in the office and that they knew not where they were.

Affiant further says that he was making a search for said file of papers and agreed statement of facts for the purpose of trying to ascertain, if possible, the origin of the case of H. C. King against Sarah D. Hatfield and Nancy C. Rutherford, which affiant had a short time before been informed had been decided by the district judge for the district of West Virginia, and was then pending on appeal in the Supreme Court of the United States, where it appeared to have been carried by the defendants, Hatfield and Rutherford.

Affiant then made inquiry of the said deputy clerk, J. T. Watters, and was informed by him that M. F. Stiles, attorney for Henry C. King, brought into his office a typewritten copy of what he called the record in the case of King against Sarah D. Hatfield and Nancy C. Rutherford, and requested said deputy to certify the same, which the said deputy refused to do, stating that he did not have the file of papers; whereupon said Stiles returned to his own law office and brought back the file of papers, but that said deputy clerk still refused to certify the copy, stating to said Stiles that the file had not been in his office, and that there were orders in the file endorsed to be entered by the district judge, but not in fact entered, and that if he, said Stiles, wanted the record certified, he would have to go to Parkersburg to Col. Dellicker, the clerk; that said Stiles insisted upon said deputy certifying the record and stated that he was anxious to have the same done so as to send it at once to the city of Washington to procure an appeal, and that all parties to the suit were equally anxious, and that he, said Stiles, would see that the cost of the record was paid, but that said deputy still refused to certify the writing.

Affiant was further informed by said Watters that at a later date the question of paying for the record in said case of King against Hatfield and Rutherford was mentioned to

said Stiles, and he obligated himself to Col. Dellicker, the clerk, to pay for the same.

Affiant was further informed by said deputy clerk that he was familiar with all the cases pending in the court at Charleston, of which he was deputy clerk; that the said file of papers in the case of King against Hatfield and Rutherford were kept out of the clerk's office; that Henry C. Flesher, who was marked as counsel for the defendants in said cause, did not appear in said cause in court, and, so far as he knew, was not present when any steps were taken therein, if, in fact, any were taken in court, and that the defendants, Sarah D. Hatfield and Nancy C. Rutherford, were never present either in the clerk's office or in the court at any time to protect their interest in said cause.

Affiant further says that he requested said deputy clerk, Watters, to give him an affidavit showing the information given as above stated, but said deputy clerk stated that he did not feel at liberty to do so, unless affiant would obtain the consent of his principal, Col. Dellicker, that he give such affidavit.

JNO. A. SHEPPARD.

Subscribed and sworn to before me in the county aforesaid this 27th day of September, 1901.

RUDD T. NEEL,
Notary Public, Cabell County, West Va.

STATE OF WEST VIRGINIA, }
Cabell County Court Clerk's Office, }

I, F. L. Doolittle, clerk of the county court of Cabell county, in the State aforesaid, do hereby certify that Rudd T. Neel whose name is signed to the annexed certificate bearing date the 27th day of September 1901 is a notary public in and for said county, duly commissioned and qualified, and is authorized by the laws of this State to take the acknowledgment of deeds and other writings, to administer oaths, and to take affidavits; and that the name thereto subscribed is, I verily believe, his genuine signature.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at the court-house of said county, this 27th day of September 1901.

[Seal County Court, Cabell County, West Virginia.]

F. L. DOOLITTLE,
Clerk Cabell County Court.

EXHIBIT No. 23.

STATE OF WEST VIRGINIA, } *To wit:*
County of Mingo, }

A. M. Toler being first duly sworn upon oath says that he is about sixty-seven years of age, that since the year 1858 he has resided on the left fork of Ben creek in Logan now Mingo county then Virginia but now West Virginia that he was well acquainted with Aly Hatfield who died in February 1870; that he was well acquainted with Joseph Hatfield a son of said Aly Hatfield; that on the 28th day of September 1858 affiant intermarried with Martha Hatfield a daughter of the said Aly Hatfield; that the said Aly Hatfield left the following-named children surviving him viz. Joseph Hatfield, Phoeba Ferrell, Nancy Ellis Martha Toler and one grandchild Leander Hatfield son of Wesley Hatfield a son of Aly Hatfield.

Affiant further says he is thoroughly well acquainted with the lands of the said Aly Hatfield situate on the left fork of Ben creek now in Mingo county but formerly in Logan county in said State of West Virginia and particularly with the two tracts of 150 and 330 acres granted by the Commonwealth of Virginia to said Aly Hatfield in 1859; that said two tracts of land adjoin other lands owned by the said Aly Hatfield and after his death by his son Joseph and after his death by Sarah D. Hatfield widow and Nancy C. Browning daughter of said Joseph Hatfield that in 1862 or 1863 said Aly Hatfield moved to and continued to live upon said lands until his death except the portion thereof conveyed to his children; that in 1861 said Aly Hatfield conveyed to his daughter Martha the wife of affiant a portion of said tract of 330 acres granted as aforesaid which portion is estimated to contain about 150 acres. He also conveyed by the same deed another adjoining tract supposed to contain about 50 acres; that about 1865 affiant moved with his family upon said land so conveyed to his wife and has from that day to this continued to reside upon said land; that he cleared enclosed and cultivated a large part of said land so carved out of said tract of 330 acres more than twenty-five

years ago and his wife Martha was in the actual visable, adverse and exclusive and continuous possession of said land so conveyed to her from 1865 till her death in 1891 and her children and affiant have been and still are in such actual possession of all of said land by residence enclosure and cultivation.

That Joseph Hatfield son of said Aly had the actual adverse exclusive and continuous possession by residence cultivation and enclosure of the said 450 acres and the residue of said 330 acres from the death of his father Aly till his own death in March 1893 and his wife Sarah D. and his daughter Nancy C. have continuously resided upon and adversely held said lands since said date.

That neith- the said Henry C. King nor any person under whom he claims said Morris grant ever had possession of any part of the lands of said Aly Hatfield or of the said Joseph or of the said Sarah D. Hatfield and their daughter Nancy C. since affiant's knowledge of said lands in 1858 nor did he or they to affiant's knowledge or information ever clear enclose or oc-upy a single foot of said Morris grant situate in West Virginia. Affiant is well acquainted with the ter-itory in West Virginia now claimed by said King to be covered by said Morris grant and no part of such ter-itory to the knowledge or information of affiant was ever possessed or oc-upied by said Henry C. King or those under whom he holds and every part thereof except perhaps some small scraps principally situate along the mountain tops and spurs and undesirable in character or value have been occupied lived upon and adversely held by the citizens under grants from Virginia and West Virginia.

That affiant is fairly well acquainted with the citizens throughout said ter-itory and if said King or any of his predecessors in claims had ever oc-upied any portion of said ter-itory he most likely would have known it personally or by information from the citizens.

A. M. Toler.

Taken subscribed and sworn to before me this September 13th 1901.

M. A. Hatfield, *Justice*.

STATE OF WEST VIRGINIA, }
Mingo County, } *To wit:*

I, James Damron, clerk of the county court which is a court of record, in and for the county and State aforesaid, do certify that M. A. Hatfield whose name is signed to the foregoing writing was, on the 13th day of September, 1901, a justice of the peace (duly qualified) in and for the county and State last mentioned, and that he is authorized under the laws of my said State to administer an oath. I further certify that I am acquainted with his signature and that his signature as signed to the foregoing writing is genuine.

Given under my hand and official seal this the 16th day of Sept. 1901.

[Seal County Court, Mingo County, West Virginia.]

JAMES DAMRON, *Clerk.*

EXHIBIT No. 24.

PARKERSBURG, W. VA., *Oct. 4th*, 1901.

Messrs. Holmes Conrad, W. P. Hubbard, Edward C. Lyon, and Campbell, Holt & Campbell.

GENTLEMEN: Some time ago Sarah D. Hatfield, with whom I have been acquainted for years, told me in confidence the inside history of the origin and conduct of the case of Henry C. King against herself and others now pending on appeal in the Supreme Court of the United States, and has since given me an affidavit embodying such history, but only after an assurance from me that I would not use it unless it became necessary in order to secure an order remanding the cause to the circuit court of the United States, and that it would not be used even in that event if using it would result in the loss of her land. Of this question I was to be the judge, and I am of the opinion that the affidavit may be used with safety to Mrs. Hatfield; for, while it may show such a collusion and improper arrangement between her and the representatives of Henry C. King in the suit of said King *vs.* S. S. Altizer *et al.*, involving the lands embraced in the present controversy as might, if entered into in the present suit, constrain the Supreme Court, in the event it should remand or dismiss it in consequence thereof, to affirm the decree of the circuit court in so far as it affects Mrs. Hatfield in consequence of her being *in pari delicto* with King, still it would not do so in the present suit because she made no agreement about the present suit and it appears from her affidavit that she never knew of its institution even until after it had resulted in a final decree in the circuit court and had been appealed to the Supreme Court.

The affidavit is of such a character as to be useful to us, and I believe for the above reason, may be used with safety to Mrs. Hatfield; but I hesitate to use it for fear I may be mistaken in my view, and, in that event, I might be the innocent means of depriving her of her property. I would like, therefore, to have the benefit of your views upon the probable legal effect upon Mrs. Hatfield of the use of her

affidavit, and also for you to communicate to our clients interested in the matter the fact of the existence of the affidavit and the conditional secrecy under which it was obtained and is held; for, although I have made the woman no promises, except as above stated, still, in the event I should exercise my discretion to use the affidavit, and should, in consequence of mistaken judgment, injure her, I would feel that she should be made whole by some one.

Very respectfully, JNO. A. SHEPPARD.

EXHIBIT No. 25.

WASHINGTON, D. C., *October 10th*, 1901.

Mr. John A. Sheppard, Williamson, W. Va.

DEAR SIR: Mr. Edward C. Lyon has handed us a copy of your letter of the 4th instant to himself, Mr. Conrad, Mr. Hubbard, and Campbell, Holt & Campbell, concerning the use of the Sarah D. Hatfield affidavit, and with the statement that he and they agreed with you that the affidavit might probably be used with safety to Mrs. Hatfield and with propriety to yourself.

We hope, therefore, that you will permit the affidavit to be used; and, while it appears from what you and your associates say, that there is little or no danger of loss resulting to her, still, in order that you may be relieved of all anxiety in the premises, we agree that, if the affidavit be used, we will hold Mrs. Hatfield harmless against all consequent loss to her.

In addition, we would say that we are advised that it may become proper to give the court a full account of the manner of the procurement of the affidavit in question, and we therefore request that you give us its history in the form of an affidavit.

Very respectfully,

STUART ROSS.
EGBERT MILLS.
EGBERT MILLS, *Trustee*.
ARTHUR D. BRIGHT.
ARTHUR D. BRIGHT, *Trustee*.
WILLIAM H. LAWSON.
WILLIAM KRONENWET.

EXHIBIT No. 26.

DISTRICT OF COLUMBIA, }
City of Washington, } *ss:*

Edward C. Lyon of full age being duly sworn according to law on his oath says that he is a counsellor-at-law and resides at Morristown, New Jersey, and as such counsellor represents with others Egbert Mills, Egbert Mills, trustee, Arthur D. Bright, Arthur D. Bright, trustee, William H. Lawson, William H. Lawson, trustee and William Kronenwet, who are defendants in the case of The State of West Virginia *vs.* Henry C. King and some four hundred other defendants, now pending in the circuit court of Cabell county, West Virginia, a number of which defendants or those under whom they claim being also defendants in the action of ejectment brought in the circuit court of the United States for the district of West Virginia by Henry C. King against S. S. Altizer, S. D. Hatfield, W. C. Mullens and numerous others.

That he has been frequently in the State of West Virginia during the past two years chiefly for the purpose of looking after the interests of his said clients who own large bodies of land within the bounds of the Robert Morris 500,000-acre survey as said bounds are claimed by said King, spending much of his time in said State and that a large part of his time during the said two years has been occupied in looking after the interests of his said clients, that he has been a number of times during said period in the office of the clerk of the circuit court of the United States at Charleston, West Virginia, and also in the office of the clerk of the circuit court of the United States at Parkersburg, West Virginia. That he has endeavored to keep informed of all litigation affecting his said clients, and of all suits in which the same questions as those arising in said litigation were involved and of suits in which the validity of the claim of said Henry C. King and the Morris survey were involved and has made inquiry for such suits in said clerks' offices and has been diligent in said inquiry.

That this deponent knew nothing of and never heard of the institution or pendency of the suit of Henry C. King *vs.*

S. D. Hatfield and Nancy C. Rutherford instituted in the circuit court of the United States for the district of West Virginia at Charleston, nor of the opinion filed by the judge in said cause nor of the appeal taken to the Supreme Court of the United States until after said appeal had been taken and the cause submitted in the Supreme Court of the United States, and that if this deponent had had knowledge of said suit he would have made an effort to have had the interest of said clients protected and a full defense made to that suit, or have made an effort to procure its dismissal.

EDWARD C. LYON.

Sworn to and subscribed to before me this 26th day of October, A. D. 1901.

{ Seal of William H. Baden, Notary Public, District of Columbia. }

WILLIAM H. BADEN,
Notary Public, D. C.

EXHIBIT No. 27.

STATE OF WEST VIRGINIA, }
Mingo County, } *To wit:*

S. U. G. Rhodes, being first duly sworn, upon his oath says:

On the 15th day of October, 1901, I received a letter from Nancy C. Browning, (formerly Nancy C. Rutherford) requesting my services as attorney for her in the case pending in the Supreme Court of the United States, and therein styled Sarah D. Hatfield and Nancy C. Rutherford against Henry C. King. I herewith file the letter so received, as part of this affidavit, marked "Browning."

I accepted the employment and pursuant thereto went to see Major H. C. Flesher, in relation to said suit. I found him on his farm in Jackson county on the 18th of the present month. He asked me where I was going and I told him I had come to see him on some business—that I represented Nancy C. Browning, formerly Nancy C. Rutherford, and showed him the letter I had received from Mrs. Browning, which is herewith filed. He asked me what I desired to know about the case, and I told him I wanted to know why he appeared for Nancy C. Rutherford, as he was not employed by her. He said that he never appeared in the case for her. I told him that the record showed that he appeared for Nancy C. Rutherford and Sarah D. Hatfield. He then said that Sarah D. Hatfield employed him to appear for them both. I asked him why he had not filed an answer in the case. He replied that he appeared and entered a demurrer only. I told him he ought to have filed an answer in the case, setting up the fact that Sarah D. Hatfield and Nancy C. Rutherford had been in possession of the land for 30 years or longer, and had been paying taxes on the same for that length of time. He replied by asking me if I had known them for thirty years, and I told him I had known them but ten years. He further added that if I knew more law than he did, to proceed with the case and do what I could; or, if I thought I could defeat Henry C. King, to sail in. I further asked him who paid for copying the record for ap-

peal, and if he had anything charged to my client, Nancy C. Browning. He replied "Your client has not paid anything, has she?" To which I said "No." He said "Well, there is nothing charged against her. The copying of the record has been settled and if your client has paid nothing, she has no right to kick, and my appearing for Sarah D. Hatfield and Nancy C. Rutherford has in no way prejudiced their rights, for they will both be taken care of regardless of how the suit is decided in the Supreme Court." I asked him in what way they would be taken care of or provided for, to which he replied "They will both be taken care of and that is enough for me to say to you."

Affiant further says that the foregoing is all the information that he was able to obtain from said Flesher in relation to the suit above mentioned.

S. U. G. Rhodes.

Taken, subscribed and sworn to, as witness my hand and official seal this 28th day of October, 1901.

[Seal County Court, Mingo County, West Virginia.]

Jno. P. Wayman,
Deputy Clerk Co. Ct., Mingo Co., W. Va.

Copy.

Wharncliffe, W. Va., *Oct. —th*, 1901.

Mr. S. U. G. Rhodes:

I have learned that Henry C. King has one my land in a suit broght before Juge Jackson and that Mr. Flesher of Welch apeared for me in the case I do not see why he should hav done so for I did not employ him and I want you to look after my interst and make Mr. Flesher explain to you why he has acted as my lawyer and lost my land please do this at once.

Nancy C. Browning.

No. 221.
Brf. of Conrad & Lyon for Pet.

Office Supreme Court U.S.
FILED
DEC 7 1901
JAMES H. McKENNEY
Clerk.

Filed Dec. 7, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

BRIEF FOR PETITIONERS.

HOLMES CONRAD,
EDWARD C. LYON,
For Petitioners.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

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No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
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HENRY C. KING, APPELLEE.

BRIEF FOR PETITIONERS.

The "affidavits and exhibits in opposition to petitions and motions of Nancy C. Browning, Stuart Wood, and others" do not even tend to meet or overcome the allegations made in said motions and petitions.

The gravamen of the charges made in the motions and petitions is that Hatfield and Rutherford, the appellants here and defendants in the court below, did not authorize such appeal to be taken, and that the case is in this court without authority from them; that they did not authorize any one to appear as their attorney and represent them in

the lower court; that they did not even know of the institution or pendency of the suit against them.

In her affidavit (Record, pp. 55, 56) Mrs. Hatfield gives a conversation had between Mr. Stiles and herself in 1895, in relation to an ejectment suit, on an occasion when Mr. Stiles, with a Mr. H. K. Shumate, was at her house.

Now, we would reasonably expect to find in Mr. Stiles' affidavit an explicit, clear, and unambiguous denial or admission of such conversation, for the matters recited by Mrs. Hatfield very nearly concern him, but no such denial appears there. We do find (Stiles' affidavit, p. 5) an earnest denial that he was at Mrs. Hatfield's house "*with said H. K. Shumate*," with the addition that—

"*To the best of his knowledge*, had never seen her until after the stipulation was filed in court; nor had any communication with her of any nature upon any subject whatever, and this affiant knows nothing of any agreement or any negotiation for same with said Hatfield other than is herein stated, and what he learned from said Shumate and V. A. Wilder, whose affidavit will be presented herewith, and said Hatfield never met said Flesher anywhere at any time pursuant to any agreement with this affiant."

Mr. Stiles does not deny that he did have with Mrs. S. D. Hatfield the conversation recited in her affidavit. He denies that he was at her house "with said H. K. Shumate," and that he had never seen her or "*had any* communication with her of any nature upon any subject whatever," "*until after the stipulation was filed in court.*"

Here are two negatives, each pregnant with the full admission of the truth of Mrs. Hatfield's statement. He may *not* have been at Mrs. Hatfield's house "with said Shumate,"

and he may *not* have been there "until after the stipulation was filed in court," and yet he may have been there with some *other man*, and *after* the stipulation was filed in court, and had the conversation as it is recited. He does not deny, but by the form of expression he employs he does tacitly admit, that he did have such conversation.

This intelligent, experienced lawyer, confronted by charges so grave—of a conversation had with a specified person at a particular place—would, if he could, have given direct, explicit, and unequivocal denial to the charge and have left nothing to implication or construction.

Shumate's Affidavit.

Mrs. Hatfield states that Mr. Shumate had long been her legal counsel, and that he brought Mr. Stiles to her house and introduced him to her; that this was "about the time the declaration in ejectment and restraining order were served upon her," in the year 1895, and that about two months later these same two persons returned and remained all night at her house, when the conversation with Stiles took place.

Now, Mr. Stiles is not a gentleman who once seen is easily forgotten. It is hardly possible that his person could be confounded with that of any other.

Mr. Shumate does not deny the statement made by Mrs. Hatfield. He does not deny that he did take Stiles to her house and introduce him to her. He has thought it enough to give in his affidavit a detailed account of a visit which he and "Colonel V. A. Wilder" paid to Mrs. Hatfield, and then say:

"To the best of affiant's recollection, M. F. Stiles, Esq., then and now counsel for Mr. King, was not present at either of the times aforesaid, and that Colonel Wilder was present to sanction the agreement. He has no recollection that Mr. Stiles was ever there with affiant—at any time."

Here is not only no contradiction of Mrs. Hatfield's statement, but the employment of language that appears to be evasive.

Mr. Shumate does not state that he and Mr. Stiles were not present together at the house of Mrs. Hatfield. He does not deny that he introduced Stiles to Mrs. Hatfield, but that "to the best of his recollection" Stiles was not present when he (Shumate) was there with Wilder, and that he "has no recollection" that Stiles was with him there at any time.

Now, this gentleman, like Mr. Stiles, is a lawyer, and appreciates the force and value of accuracy of expression. It cannot be a matter of mere "recollection" on his part, but must be of his distinct and positive knowledge, whether he was at the house of Mrs. Hatfield with Mr. Stiles in the year 1895, and especially whether after a first visit he returned there two months later with Mr. Stiles on business of such importance as this.

Mrs. Hatfield swears positively that they were there, and that the conversation recited by her did take place with Mr. Stiles. She is corroborated in this by the affidavits of *Aley Browning*, *T. H. Graham*, and indirectly by *Crockett Allison*, and by *A. M. Toler* (Exhibit No. 10) and *J. M. Toler* (Exhibit No. 11).

S. D. Hatfield and Nancy C. Rutherford have never become parties to the cause now pending here on appeal, either by service of process or by appearance in person or by counsel.

Both of them swear positively as to this.

Mrs. Hatfield says that—

"In the early part of February, 1901, she thinks about the 10th or 12th, she received a letter from Henry C. Flesher for her to come to Welch at once. That she was sick and could not go for a few days, but about a week later she did go, and for the first time she was then told by the said Henry C. Flesher that a suit had been brought in the Federal court before Judge Jackson by Henry C. King against her and her daughter, Nancy, and that the case had been decided against them, and that they had appealed the case to the Supreme Court of the United States. This was the first information of any kind that affiant ever had of this suit or of its decision; that no summons or other process therein was served on her" (Exhibit No. 7, p. 57).

Mrs. Browning (called Rutherford) says:

"That she had no notice or knowledge whatsoever that said suit was to be brought, or was brought; that no summons to answer in said suit was served upon her, or in any manner brought to her notice; that she never, in any manner or at any time, directly or indirectly, employed or authorized the said Henry C. Flesher to represent her in said suit, or to appear for her therein, or to represent her in any other controversy or matter pertaining to her said lands, or the title thereto, and that she never at any time, authorized any other person or persons to employ said Flesher or any other attorney to appear for or represent her in said suit," &c.

Now, how are these positive statements, made by the parties themselves, overcome, repelled, or in anywise shorn of their apparent force? The only person who attempts to controvert them, by affidavit, is Mr. Henry C. Flesher, who states that some time about May, 1895, he was employed by Mrs. Hatfield to represent her as her attorney in an action of ejectment brought by Henry C. King against her and Mrs. Rutherford and Mr. Claypool and others for the recovery of these lands, which action does not appear ever to have been determined. He then says, as to his appearance as attorney in this suit in equity:

"Of my absolute authority to represent the said Hatfield and Rutherford in the King litigation, I had and have no more doubt than that the plan of trial agreed upon was advantageous to them."

Just exactly what this means is not at all apparent. He does not pretend that he had any color of authority from Mrs. Rutherford, whom it does not appear that he had ever seen, and his only excuse for assuming to appear for Mrs. Hatfield in this chancery suit is that she had employed him to appear for her in an ejectment suit for the same property three years before.

He then states that—

"Considerable time after the filing of the bill in the present case, M. F. Stiles, one of the attorneys for the complainant therein, meeting me, on the street at Welch, told me he had filed the same, stating the general nature of it, and asked me whether I would accept service, or waive process for the defendants and avoid the cost of sending a marshal more than 200 miles to make service. I told him to send me a copy of his bill when he got home, and I would see what to do. Soon after he sent me a copy."

He then states that he examined the bill and concluded that the proper defense was by demurrer, and says:

"I therefore framed the demurrer to what appeared to me the vital point and one defect in their case, and at the next term of the court at Charleston presented it in person in court, having that day notified said Stiles, whose office was opposite the court-house, that I would do so, and the demurrer was, by order made in open court, set down for argument and after brief oral discussion was submitted, the court being supplied with copies of all the briefs that had been filed by all the counsel in the case of King *vs.* Mullins, in this court."

The demurrer was overruled; and says:

"After the decision of the case, there was nothing to do but do nothing or appeal. I wrote Mrs. Hatfield the result and that I would appeal, and did so. Somewhat later, at my request, she came to see me, and fully approved my course in the case. Her approval and attitude will appear from a letter received from her some time after, and hereto attached," &c.

Mr. Flesher then states what appears to be his sole ground for assuming to act for these persons. He says:

"At the time the suit was brought, and I appeared to it, I still had the papers of Mrs. Hatfield and Mrs. Rutherford, as I supposed her name still to be, not having heard about her second marriage, and no suggestion of any revocation of my authority had been made by or on behalf of either of them. Mrs. Rutherford had sanctioned and ratified the action of Mrs. Hatfield in employing me to represent her *in the first place, and I had no doubt about my continued authority to act for them.*"

These statements suggest some pertinent inquiries.

How did Mr. Flesher's employment as attorney for Mrs. Hatfield in the ejectment suit in 1895 extend to and warrant his appearance for her, and his waiver of process to the bill in equity, which was not filed until the 8th of October, 1898?

When and where and how did Mrs. Rutherford authorize Mr. Flesher to appear for her in the ejectment suit?

Why does not Mr. Flesher produce the letter which he says that he wrote to Mrs. Hatfield after his demurrer was overruled?

Although his reason for waiving process was to "avoid the cost of sending a marshal more than 200 miles to make service," yet why did he not write to Mrs. Hatfield and advise her of the suit, and obtain her instructions?

When and where and how did Mrs. Rutherford "sanction and ratify the action of Mrs. Hatfield in employing" Mr. Stiles to represent her "in the first place"?

All these and many more like inquiries are suggested by Mr. Flesher's statement, the full replies to which might reasonably be expected to appear in the statement itself.

It may be enough for the present purpose to call attention to the facts appearing in the case of *Shelton vs. Tiffin et al.*, 6 Howard, 186, where the judgment rendered on an appearance by an agent was held to be a nullity because "it does not appear that he had authority to waive process and defend the suit."

On this point, then, we submit that the appearance and the waiver of process and the stipulation to dispense with answer to the bill were all wholly without color of authority and the decree made on the bill was a mere nullity.

Irregularity of the Proceedings in this Cause in the Lower Court.

It is admitted by Messrs. Stiles and Flesher that there was no process *issued* as to the defendants; that the case was submitted on bill and demurrer "after a brief oral discussion," and that when the demurrer was overruled, Mr. Flesher, as counsel for defendants, did "decline to make other answer to said bill and elect to stand upon their said demurrer" (Record, p. 44).

Mr. John A. Sheppard testifies ("Petitions and Exhibits," p. 99) that on inquiry made by him of J. T. Watters, deputy clerk of the United States circuit court, at Charleston, West Virginia, he was informed by that officer that Mr. M. F. Stiles had brought to the clerk's office—

"a typewritten copy of what he called the record in the case of King *vs.* Sarah D. Hatfield and Nancy C. Rutherford, and requested said deputy to certify the same, which the said deputy refused to do, stating that he did not have the file of papers; whereupon said Stiles returned to his own law office and brought back the file of papers, but that said deputy clerk still refused to certify the copy, stating to said Stiles that the file had not been in his office, and that there were orders in the file indorsed to be entered by the district judge, but not in fact entered, and that if he, said Stiles, wanted the record certified he would have to go to Parkersburg, to Colonel Dellicker, the clerk; that said Stiles insisted upon said deputy certifying the record, and stated that he was anxious to have the same done, so as to send it at once to the city of Washington to procure an appeal, and that all parties to the suit were equally anxious, and that he, said Stiles, would see that the cost of the record was paid, but that said deputy still refused to certify the writing."

Further, the clerk of the circuit court of the United States for the southern district of West Virginia certifies that all of the law and chancery order books of the United States circuit court, sitting at Charleston, are in his custody; that he has "carefully examined the law and chancery order books in my custody from the time of entry of the final decree of the 2d day of June, 1900, in the equity cause styled Henry C. King *vs.* S. D. Hatfield *et al.*, and I find no decree or order whatsoever upon the said books filing any petition for an appeal from said final decree, or any order or decree allowing an appeal therefrom or approving any appeal bond."

Now, does Mr. Stiles, in his affidavit, deny any of the specific statements made by the deputy clerk? Does he deny that he, the counsel for the winning side, took the typewritten paper to that clerk and insisted upon having it certified as a true copy of the record of this case, in order to make an appeal to this court?

Does he deny that records of the court contained no entries of the order and decree, which the judge of the court had indorsed to be entered?

Does he deny that there was no entry of an appeal applied for or allowed or of an appeal bond?

Does he deny any one of the specific allegations made in the petitions?

His only denial is this (Stile's affidavit, p. 11):

"And affiant further says that this suit was regularly brought and regularly proceeded in, and any statement to the contrary is not true and is an unwarranted reflection *upon the circuit court.*"

And all that Colonel Buttrick, whose name is signed to the bill as co-solicitor with Mr. Stiles (Record, p. 11), says:

"That said cause was regularly on the docket of said court and was regularly called as all other cases when reached, and this affiant was in court at the time the demurrer to said bill was overruled in May, 1900, the announcement of said ruling being made in open court, upon the call of the docket, in the presence of a large number of the bar, and affiant distinctly remembers that some member of the bar commented to the court upon said cause and the court's ruling thereon" (Buttrick's affidavit, p. 26).

But the court's record shows and Mr. Shumate admits that the cause was *not* "regularly proceeded in." No subpœna or summons to answer the bill had ever issued from the clerk's office, and the cause could not have been on the rule book in the clerk's office. In fact, the bill and the demurrer thereto were placed in the hands of the court on the 8th day of June, 1899.

The demurrer is certified by H. C. Flesher, and he alone makes oath that it is not interposed for delay.

Rule 31 of practice in equity in the Federal courts requires that such affidavit shall be made by the "defendant," and does not permit it to be made by the counsel.

The case presented to the court, then, is this: This case stands on the docket of this court as an appeal by two women, against whom a decree had been made by the lower court. One of them comes here by her petition and alleges that the attorney who appeared to represent her in the court below and on this appeal had acted altogether without authority from her.

She files the affidavits of herself and her codefendant in support of her petition.

Other persons come in by petitions and show their interest in the subject-matter, and file affidavits and transcripts from public records and certificates of public officers. Among these is the State of West Virginia, whose legislature and board of public works have required the intervention of the State, by counsel, in this cause. Charges deeply affecting the professional character and conduct of Maynard F. Stiles and Henry C. Flesher are made directly and specifically in these petitions, and facts and circumstances are distinctly and clearly charged, and are set out in the affidavits, which support the charges so made; these defendants appear in court, and, on their motion, 15 days, which is extended to 20 days, is allowed them, within which time to obtain affidavits in rebuttal of those filed with the petitions.

Surely, now, two attorneys-at-law, one of them 66 years of age, and who has spent his entire life in West Virginia, charged with the course of professional conduct here so particularly set forth, should bring from their brethren of the bar a cloud of witnesses to repel with indignation a baseless or an exaggerated charge, the facts as to which must be within the personal knowledge of many of them.

The matters alleged in the petitions and affidavits are, if not true, easily susceptible of refutation and disproof. Beyond all question, they are each and all open to direct, positive, and explicit denial by the two persons so charged. What do we find, now, on the submission?

The only witnesses, out of all the bench, the bar, and the people of West Virginia, whose affidavits can be procured

are those of Maynard F. Stiles and Henry C. Flesher, the two persons charged; of H. C. King, the plaintiff in the cause; E. L. Buttrick, one of the counsel, whose name is signed to the bill; H. K. Shumate and V. A. Wilder, who appear by the record to be implicated in the transaction here impeached. Of Col. E. L. Buttrick we are bound to say that no imputation of any kind can attach to him. He stands far above reproach and criticism as a lawyer, as in other days he did as a gallant soldier; but from the two persons charged there cannot be found one clear, positive, distinct denial of any one of the charges made in the petitions or of the matters set out in the affidavits, but all such denials are vague, general, equivocal, and evasive.

King or His Attorneys Have Paid All the Costs and Expenses of This Litigation.

Mrs. Hatfield states in her affidavit ("Petition and Exhibits, Exhibit No. 7, p. 55) that Mr. Stiles told her in 1895, speaking of the ejectment suit, "that she should not have to pay any lawyer fee or costs." Mr. Stiles does not deny this. Mr. Rhodes states (Exhibit No. 27, p. 109) that in his conversation with Mr. H. C. Flesher on the 18th of October, 1901—

"I further asked him who paid for copying the record for appeal, and if he had anything charged to my client, Nancy Browning. He replied, 'Your client has not paid anything, has she?' To which I said, 'No.' He said, 'Well, there is nothing charged against her; the copying of the record has been settled, and if your client has paid nothing, she has no right to kick, and my appearing for Sarah D. Hatfield and Nancy C. Rutherford has in no way prejudiced their

rights, for they will both be taken care of, regardless of how the suit is decided in the Supreme Court.'"

With Mr. Flesher's affidavit there is exhibited a letter to him from Mrs. Hatfield, of date February 27, 1901, on which he seems to rely as a ratification of his appearance and action for her in this suit. This letter concludes thus:

"Have Mr. Ieager to settle the cost of my suit and send me a receipt. I want to be ready for all that comes around."

It might be enough to say, as to this, that it does not appear what "suit" she referred to, nor whether Mr. Ieager did settle the costs and send her a receipt. Certainly no receipt or evidence of payment on her account is produced, nor any affidavit from Mr. Ieager offered here. But this letter of Mrs. Hatfield is readily accounted for when we read Mr. Sheppard's affidavit (Exhibit No. 1, p. 37), in which he says that his first interview with Mrs. Hatfield was about February 20, 1901, at which time she declined to tell him what arrangement she had made, and he then pointed out to her the evil consequences that might follow from her conniving with those who were suing her. He then says:

"She came to my office in company with said Allison, *a month or two later*, and told me she had been thinking over what I had said to her when there before, and that she did not know that the arrangement she made with King's representative would operate to the prejudice of any other person, and after thinking the matter over fully she had decided she would tell me what she had done," &c.

Her letter to Flesher was dated February 27, 1901, one week after her first interview with Mr. Sheppard, and nearly two months *before* her second interview, and Sheppard is

confirmed by the affidavit of Mr. Crockett Allison. But it will be observed that Mr. Flesher makes a very questionsable denial of Mr. Rhodes' testimony. The only feature of it he feels warranted in contradicting is the single sentence he quotes. He says:

"I did not tell him that 'they will both be taken care of, regardless of how the case is decided in the Supreme Court,' but I did say that their rights would be taken care of without reference to him, or something to that effect."

Reference to the books of the clerk's office of this court will reveal that nearly two-thirds of the costs paid there on this appeal have been paid by Mr. Stiles, the counsel for the appellee.

We have not thought it necessary to refer to the temper and terms in which Mr. Stiles has indulged himself in his *affidavit* in referring to some of the gentlemen who appear as witnesses for these petitioners. Indignant resentment is pardonable when the righteous are unjustly charged, but it does not usually express itself in a *tu quoque*. When an intelligent lawyer is charged with having had the conversation which Mrs. Hatfield swears she had with Mr. Stiles on the occasion of his visit to her house in company with Mr. Shumate, such intelligent lawyer, if he had not had such conversation, would hardly content himself with the statement that he was never there "*with said H. K. Shumate*," but would deny that such conversation, at any time and under any conditions, ever occurred.

HOLMES CONRAD,
EDWARD C. LYON,
For Petitioners.

No. 221.
Bx. of Hubbard & Campbell
Office Supreme Court U.S.
FILED
DEC 16 1901
JAMES H. McKENNEY,
Clerk

Filed Dec. 16, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

SARAH D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WEST VIRGINIA.

BRIEF FOR INTERVENORS.

W. P. HUBBARD.
C. W. CAMPBELL.
JOHN H. HOLT.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1420

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

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vs.

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WEST VIRGINIA.

BRIEF FOR INTERVENORS.

STATEMENT OF CASE.

In the latter part of 1893 Henry C. King purchased the claim of one Le Moyne to a tract of 500,000 acres of land, known as the Robert Morris tract and situate in the States of Virginia, West Virginia, and Kentucky. This land was originally granted by the Commonwealth of Virginia to Robert Morris in the year 1795, and in consequence of various transfers, statutory and otherwise, was finally claimed by the said Le Moyne, who sold and conveyed the same, as aforesaid, to the said King.

None of the claimants of the Morris title from the year 1830 down to the year 1863, when the State of West Virginia was formed out of the State of Virginia, ever entered said land in the State of Virginia on the books of the commissioner of the revenue and caused any taxes to be charged thereon or paid any taxes whatsoever in any or either of the counties where said land is situate, in consequence of which the title thereto became forfeited to the Commonwealth of Virginia, and that portion thereof situate in the new State passed thence into the State of West Virginia, on her formation, except such parts thereof as had been before granted to sundry patentees. This forfeiture has never been released or redeemed.

After the formation of the State of West Virginia the predecessors of Henry C. King undertook to redeem this land from forfeiture in the courts of West Virginia, and in 1883 obtained some such decree; but since that date said land has not been entered upon the land books of any of the counties of the State of West Virginia, where the same is situate, and no taxes have been charged thereon or paid by the said King or any person or persons under whom he claims, and in consequence thereof, and by virtue of the provisions of section 6 of article 13 of the constitution of the State of West Virginia, even if the redemption of 1883 should be held to be good, the land has once more become forfeited and the State's title thereto transferred to the junior occupants thereof.

Divers and sundry portions of said land have from time to time from 1800 been granted by the Commonwealth of Virginia to actual settlers, who and whose descendants and grantees have cleared away the forests, improved the land,

and regularly paid the taxes thereon. Other portions of said land have in like manner been granted to settlers by the State of West Virginia.

Notwithstanding the forfeiture of his title to this land and his failure to redeem the same, and notwithstanding the transfer thereof to the junior patentees and occupants thereof, the said King, shortly after his purchase from Le Moyne, as aforesaid, came into the State of West Virginia—that is to say, in the year 1895—and instituted in the circuit court of the United States for the district of West Virginia a number of actions of ejectment against the grantees of this land from the two States of Virginia and West Virginia and their assigns. One of these actions was against S. S. Altizer and one hundred and twenty-three other defendants, including Sarah D. Hatfield and Nancy C. Rutherford, the appellants here, and also Alex. McClintock, John McClintock, and M. B. Mullins. Another of these actions was against Asa Aliff and ninety-six other defendants. Another was against Conley Blankenship and fourteen other defendants.

The first-named action was tried as to Alex. McClintock, John McClintock, and M. B. Mullins, resulting in a verdict and judgment in favor of said defendants on instructions from the court to the jury to the effect that Henry C. King's claim of title was outstanding in the State of West Virginia by forfeiture for non-entry and non-payment of taxes. This judgment was reviewed on a writ of error prosecuted by the said King in this court and was affirmed.

All of these actions of ejectment are still pending and undetermined, and many, if not all, of the intervenors here are parties thereto. In addition to this, there is pending in the courts of the State of West Virginia a proceeding on behalf

of said State to sell said lands for the benefit of the school fund, except in so far as junior claimants thereof may be protected by the Constitution, and there are likewise still pending and undetermined, both in the State and Federal courts of said State, a great many chancery causes instituted by the said King against the intervenors here and others relative to these lands.

With all these litigations pending, the present suit of Henry C. King against Sarah D. Hatfield and Nancy C. Rutherford (now Nancy C. Browning) was instituted. It has for its object the cancellation of the defendants' title to several tracts of land, aggregating about one thousand acres, and alleged to be located within the boundaries of the 500,000-acre tract, and the plaintiff's bill, in order to give the court jurisdiction for the cancellation of the defendants' title as a cloud, alleges that King is in possession of the land. It also alleges the unconstitutionality of the West Virginia forfeiture laws, and one Flesher, a practicing attorney, professing to represent the defendants, appeared and demurred thereto. The demurrer was overruled and a final decree permitted to be entered thereon without the intervention of any answer on the part of the defendants or either of them, although they had a complete defense to the suit and a perfect title to the land in controversy under the West Virginia law, in consequence of their actual adversary possession of the same for the period prescribed by the statute.

After this decree had been obtained an appeal was taken by Flesher for the defendants to this court, where the matter now pends, and during its pendency not only the intervenors here, but the defendants to said suit, the said Sarah

D. Hatfield and Nancy C. Rutherford, heard of its existence for the first time, and that the court below had held the forfeiture laws of the State unconstitutional; and feeling that they would be injuriously affected by such a precedent, and suspecting that the suit was fictitious and collusive, having for its object, not the settlement of a controversy between the plaintiff and the defendant, but the procurement of a precedent injurious to others, they began to investigate the origin and history of the suit, and their worst suspicions were soon strengthened. It was discovered that Flesher did not represent Nancy C. Rutherford (now Nancy Browning) and had no authority to appear for her, either in the circuit court or to appeal therefrom in her name to this court. These facts she embodied in an affidavit. In addition to this the intervenors were persuaded that Henry C. King, desiring to obtain an opinion of this court upon the constitutionality of the forfeiture laws of the State of West Virginia that would be prejudicial to their title and interest and to the interest of the other defendants in the various actions of ejectment, instituted the present suit in the circuit court, and, through his counsel, M. F. Stiles, procured Henry C. Flesher, an attorney practicing in said court, to appear thereto, without any authority whatever as counsel for the defendants thereto, without their knowledge or the knowledge of either of them, and to make such defense thereto as would falsely give the court jurisdiction, omitting the defense of the statute of limitations, and present the constitutional question aforesaid in as favorable a light as possible to the contentions of the said King. In other words, these intervenors, be-

lieving said suit to be not only a fraud and a fiction, trumped up by the counsel for King, and conducted on both sides by his counsel, not for the purpose of settling a real controversy between King and the defendants, but for the purpose of obtaining an opinion from this court hurtful to the interests of others not parties to the record, filed numerous affidavits with the clerk of this court showing these facts, and made them the basis of various petitions for leave to intervene for the purpose of moving that the decree herein be reversed and this cause remanded.

GROUNDS OF MOTION.

The grounds for this motion, as stated in the petition of A. M. Toler, as well as in the petition of Arthur D. Bright, furnish a fair illustration of the position of these and the other intervenors, and are as follows:

1. *Because the suit is fictitious and collusive.*

2. *Because the suit was instituted and is now prosecuted, not to determine any real controversy between the parties to the record, but to obtain a decree on which to prosecute actions of ejectment against persons really interested adversely to the appellee, but not parties to the record, and, among them, these intervenors.*

3. *Because this suit is a fraud upon and in contempt of this and the circuit court.*

These grounds of motion are practically but different statements of the same thing; for, if the first be true, and the suit fictitious and collusive, then the second but states the object of that fiction and fraud, and shows the effect thereof upon the intervenors, and the third, that the same is a contempt of court, follows as an unavoidable sequence.

These matters may therefore be discussed, both upon the law and the facts, as a single point.

In the first place, the record of this cause shows that Henry C. Flesher appeared in the circuit court as counsel for the defendants Sarah D. Hatfield and Nancy Rutherford, and in their names demurred to the plaintiff's bill, and, further, as their representative, signed a statement of facts purporting to have been agreed between them and Henry C. King, the plaintiff; and the affidavit of Nancy C. Browning (Exhibit No. 6, pages 50–52) emphatically states and conclusively shows "that she never in any manner, or at any time, directly or indirectly, employed or authorized the said Henry C. Flesher to represent her in said suit, or to appear for her therein, or to represent her in any other controversy or matter pertaining to her said land, or the title thereto; and that she never at any time authorized any other person or persons to employ said Flesher, or any other attorney to appear for or represent her in said suit; that she never authorized said Flesher to sign for her the agreement in writing purporting to have been made between Henry C. King, this affiant, and her mother, Sarah D. Hatfield."

Sarah D. Hatfield testifies that she did make an arrangement with M. F. Stiles, attorney for Henry C. King, by

which the said Stiles employed H. C. Flesher to represent her in an action of ejectment that had been brought in the United States court at Parkersburg by King against Simon Altizer, herself, William Claypool, and others, but "that she did not contemplate any other suit or know that any other suit would be brought against her by the said Henry C. King." She also says that she never knew of the institution or pendency of the present suit until after it had been decided against her and appealed to this court, and "that no summons or other process therein was served upon her" (Exhibit No. 7, pages 56 and 57), and the paper signed by her July 1, 1895, ratifying the action of Henry C. Flesher in the case of King against Altizer and others, confirms her statement that the employment of Flesher for her was strictly confined to the case of King *vs.* Altizer *et al.* (Exhibit 7, pages 63 and 64).

The affidavit of Mr. S. U. G. Rhodes (Exhibit No. 27, pages 109 and 110) shows that the costs upon both sides of the present litigation and of the present appeal have been borne by King or Flesher or by both, or at least by some one other than the defendants, and that it was the purpose of Flesher that the defendants should be taken care of, "regardless of how the suit is decided in the Supreme Court."

From these things it becomes perfectly apparent that this litigation has been manufactured by M. F. Stiles, attorney for Henry C. King, and Henry C. Flesher. The suit was instituted by Stiles for King without the knowledge of the defendants, for no process was issued against or served upon them, and was defended, after a fashion, by Henry C. Flesher, who appeared without authority.

The object of this fictitious suit and collusive enterprise

likewise becomes apparent when we reflect that it involves the constitutionality of the West Virginia forfeiture and transfer laws, and that the same questions are involved in the many ejectment and other suits now pending in the name of King against these intervenors and others. The object is the obtaining of a precedent, and not the settlement of a genuine controversy, and this object becomes the more apparent when we further reflect that King's bill did not make other persons interested in the particular land parties defendant. Prior to the institution of this suit Joseph Hatfield and Sarah D., his wife, and one of the defendants here, had conveyed to one Henry R. Phillips, trustee, "all the coal, gases, salt water, oil, and minerals of every description" in a portion of this same land, and, at the date of its institution, during its pendency, and at this time, said minerals were and are owned either by the said trustee or Arthur D. Bright, and yet neither was made a party defendant (affidavit of Claude Gaujot, Exhibit No. 13, page 74; Exhibit Deed to said affidavit, page 76, and petition of Bright, page 33); also at the date of the institution of said suit A. M. Toler was interested in a portion of said land and still is, yet King did not make him a party thereto (petition of Toler, pages 29 and 30; also affidavit of Toler, Exhibit No. 23, page 101). From this it is evident that the object of the suit was not to recover the particular land involved, but to establish a precedent against others; otherwise King would not have sued alone for the surface, or mere shell, but would have also sought to recover the kernel, or mineral beneath the surface. If there should remain any doubt upon the question of King's object and design, it

becomes clear when we learn from the affidavit of S. U. G. Rhodes that King did not even seek the shell, for it is there stated that Flesher said that "they" (meaning the defendants Sarah D. Hatfield and Nancy C. Rutherford, the owners of the surface) "will both be taken care of, and that is enough for me to say to you" (affidavit of Rhodes, Exhibit No. 27, page 110).

The *aroma* of the transaction and its object is further emphasized and illustrated by the secrecy with which it was conducted (affidavit of W. E. Chilton, Exhibit No. 2, page 42, and affidavit of W. R. Thompson, Exhibit No. 3, p. 45), and by the fact that it is not the first offense of the participants therein; but they have probably become hardened in their "trespasses and sins." (See affidavit of William Claypool, Exhibit No. 14, page 80; affidavit of Amanda Claypool, Exhibit No. 15, page 82; Exhibit No. 19, page 86.)

The affidavits filed in opposition do not, in our judgment, meet the question or constitute even a partial defense to the charge. They are the affidavits of M. F. Stiles, attorney for King; H. K. Shumate, also his attorney; V. A. Wilder, his agent; E. L. Buttrick, another attorney for King, and Henry C. Flesher, who represented the appellants herein. No outside person speaks in corroboration of them.

The affidavit of M. F. Stiles is largely devoted to an immaterial history of the antecedent King litigation in West Virginia, and to complaints against junior claimants of the land in controversy therein, because of their resistance of his attempted redemption of his title (just as if people attacked would not resist), and to criticism of others rather than to a defense of himself. He does, however, deny that he was ever at the house of Sarah D. Hatfield in company

with H. K. Shumate (Stiles, p. 5); but Mrs. Hatfield is sustained in her contrary contention by the very explicit affidavits of Aley Browning and T. H. Graham filed in rebuttal of Mr. Stiles (Aley Hatfield, pp. 1 and 2, and T. H. Graham, p. 3). He also denies that Flesher represented King in this or any other suit (Stiles, p. 12), and, while this may be true in the sense that King never paid Flesher an actual retainer, still the ear-marks upon the record would indicate that Stiles and Flesher were very accommodating to each other in arranging the institution of this suit, prescribing its scope, and appealing from its decree. When Stiles got ready to bring it he applied to Flesher to waive process, and the latter did it without authority by appearing and demurring (affidavit of Flesher, p. 44). And, when Flesher got ready to appeal it, his victorious antagonist, Stiles, arranged it for him by seeing the clerk and guaranteeing the payment of fees (Stiles' affidavit, p. 15).

All that it is necessary to say about the affidavit of H. K. Shumate is that to the best of his recollection it was Wilder who was at the house of Sarah Hatfield with him instead of Stiles (p. 20), and further, at page 21, he disclaims all knowledge of or participation in the present suit.

Wilder would appear to corroborate Shumate relative to the visit of the latter to the house of Mrs. Hatfield, but he neither knows, or pretends to know, anything about the origin, conduct, or history of the present litigation.

The affidavit of E. L. Buttrick discloses little, if anything, material to the present motion (pp. 26 and 27).

It appears from Flesher's affidavit that he was employed in 1895 by Sarah D. Hatfield, through H. K. Shumate, then

one of King's counsel, to defend for her and her daughter an action of ejectment instituted by King against her and others, which employment was subsequently ratified by Mrs. Hatfield, and that, in pursuance of such employment, he subsequently signed for her, her daughter, and William Claypool the stipulation, a copy of which is exhibited with his affidavit (Flesher, pp. 41–44). This, it will be borne in mind, was years before the institution of the present chancery suit; and, further, that his then employment was confined to the action of ejectment (see power of attorney attached to affidavit of Sarah D. Hatfield, p. 63) and had no relation to the present suit in equity. Notwithstanding this fact, however, it further appears from his affidavit that some three years afterward and without any other employment whatever, without the knowledge either of Mrs. Hatfield or Mrs. Browning, he appeared and represented both of them in the present suit, obviated the necessity of process by appearing for them, and never even communicated with either of them until after a final decree (Flesher, pp. 45, 46).

In other words, his utter lack of authority to represent them or either of them appears from his own affidavit. He does, however, say, at the top of page 46, that Mrs. Hatfield subsequently ratified his conduct, and files with his affidavit her letter of February 27, 1901, in confirmation of his statement (p. 49); but an examination of this letter discloses no reference to this case, and even if it did, it does not in any way contradict Mrs. Hatfield's affidavit, filed in support of this motion.

Similar cases to the one at bar, and involving the identical principle involved here, have been repeatedly argued before and decided by this court. We cite some of the

leading ones for the purpose of reminding the court of the principles laid down and relief granted by it under such circumstances. They are:

Lord *vs.* Veazie, 8 How., 251 (L. C. P. Ed., Book 12, page 1067).

Chamberlain *vs.* Cleveland, 1st Black, 419 (L. C. P. Ed., Book 19, page 93).

The American Wood Paper Company *vs.* Heft *et al.* (Supreme Court), L. C. P. Ed., Book 19, page 378.

The American Wood Paper Company *vs.* Heft *et al.*, 8 Wal., 333 (L. C. P. Ed., Book 19, page 379).

Little *vs.* Bowers, 134 U. S., 557.

South Spring Company *vs.* Amador Gold Company, 145 U. S., 300.

Lord *vs.* Veazie, *supra*, was a case brought up by writ of error from the circuit court of the United States for the district of Maine, and a motion was made in the Supreme Court by persons interested, but not parties to the record, to dismiss the appeal upon the ground that it was a fictitious case, got up between the parties thereto for the purpose of settling legal questions upon which the parties moving had property interests depending. Various documents and affidavits were filed in support of the motion, and it was argued in support of the motion that the suit was fictitious and instituted by persons to try the rights of third parties; that any person as *amicus curiæ* might make the motion; that a suit may be shown to be fictitious either by inspection of the record or by evidence *aliunde*, or by both; that the appellate court sits for the correction of errors of inferior courts and not to

adjudicate upon the agreement of parties; and, among other things, and as showing that the suit was a fiction, concealment of its institution from interested parties was urged. The judgment of this court upon the motion was that the writ of error be dismissed, and the cause remanded to the circuit court, "to be dealt with as law and justice may require," and Mr. Chief Justice Taney, in delivering the opinion of the court, said:

"The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse, and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be. A judgment entered under such circumstances, and for such purpose, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible, and the learned district judge, who was then holding the circuit court, undoubtedly suffered the judgment *pro forma* to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity and no writ of error will lie upon it."

Neither is Lord *vs.* Veazie distinguishable in principle from the case at bar. The difference in fact between the two cases seems to be that in the former the collusion was between the parties plaintiff and defendant, while in the latter it is insisted that the collusion has been between the

attorneys, Stiles and Flesher, the one representing the plaintiff, and the other professing to represent the defendants, but without their knowledge or authority, and actually in the employ of the plaintiff or the plaintiff's attorney. It seems to us that the collusion of attorneys, under such circumstances, they being officers of the court, would be more reprehensible, if anything, than collusion between parties.

Neither can it be said that there is no such necessity for the motion here as existed in Lord *vs.* Veazie, upon the theory that the appellants have the right, even in the absence of any motion, to dismiss their appeal, if they so choose; because Sarah D. Hatfield, one of the appellants, is making no such motion here, and is not represented by any of the counsel for the intervenors.

In Chamberlain *vs.* Cleveland, *supra*, Lord *vs.* Veazie, was cited with approval and followed, and it was there held, according to the syllabus of the case—

"Where it appears from affidavits and other evidence filed in behalf of persons not parties to the suit, that the appeal is not conducted by parties having adverse interests, but for the purpose of obtaining a decision of this court to affect the interests of persons not parties, the appeal will be dismissed."

The American Wood Paper Company *vs.* Heft *et al.* (first cited above) was a motion for leave to intervene and to move to dismiss the appeal upon the grounds that the suit was fictitious, and was prosecuted, not to determine a real controversy, but to obtain a decree on which to found future litigation against persons really interested, but not parties to the

record. The affidavits filed in support of the motion did not seem to have been sufficient to convince the court that the appeal should be dismissed without further investigation, but were sufficient to cause the court to issue a rule to show cause why the suit should not be dismissed, under which both parties were given leave to take and file depositions in support of and against the motion. After the rule had been awarded and the depositions taken, and it appearing therefrom that there was no genuine controversy between the parties, the court dismissed the appeal. This was the judgment in the second report of this case, *supra*.

In Little *vs.* Bowers the same principles were announced by Mr. Justice Lamar, and the cases of Lord *vs.* Veazie, Chamberlain *vs.* Cleveland, and the Wood Paper Company *vs.* Heft were cited and relied upon.

The case of The South Spring Company *vs.* Amador Gold Company is cited, not so much for the purpose of further illustrating the principles supposed to be involved here as for the purpose of showing the relief there granted upon the motion. The order of the court was, not that the appeal be dismissed, but that the judgment be reversed and the cause remanded for further proceedings in conformity to law.

It will be seen, therefore, that where a collusive or fictitious suit is shown, or where it appears that the plaintiff or defendant was in the beginning or became the *dominus litus*, on both sides, the court will, according to the circumstances of the particular case, either simply dismiss the appeal, as in The Wood Paper Company *vs.* Heft, or dismiss the appeal and remand the cause, as in Lord *vs.* Veazie, or reverse the judgment of the court below and remand the

cause, as in The South Spring Company *vs.* The Amador Gold Company.

And it is respectfully insisted here that the face of the record in this cause and the affidavits filed in support of the motion show, not only that the present suit is fictitious, as distinguished from a real controversy, but that it is the result of collusion between the attorneys Stiles and Flesher, and, further, that King, the plaintiff, through his attorney, Stiles, has from first to last been master of the litigation on both sides.

W. P. Hubbard.
C. W. Campbell.
John H. Holt.

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No. 221

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 221.

S. D. HATFIELD AND NAPOLEON C. RUTHERFORD,
Appellants,

vs.

HENRY C. KING, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF WEST VIRGINIA.

Upon Petition of STUART WOOD and Others for Rule Against Henry C. King and to Recover the Costs.

Brief of Counsel for State of West Virginia.

Supreme Court of the United States.

OCTOBER TERM, 1901.

NO. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
Appellants.

vs.

HENRY C. KING, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Upon Petition of STUART WOOD and Others for Rule Against Henry C. Flesher, and to Remand the Cause.

Brief of Counsel for State of West Virginia.

STATEMENT.

This suit was instituted in the Circuit court of the United States for the District of West Virginia, for the purpose of annulling certain instruments of writing, under which the defendants claim title to certain lands in said state, and which said instruments of writing, the complainant alleges, constitute a cloud upon his title to a tract of land claimed by him, being the so-called Robert Morris 500,000 acre grant, made by the Commonwealth of Virginia to Robert Morris in 1795. The bill was filed October 8th, 1898, and Henry C. Flesher, an attorney practicing in said court, accepted ser-

vice for the defendants, entered their appearance in said suit, and demurred to the bill. The ground assigned for demurrer is that it appears from said bill that the title to the land claimed by complainant was, by the Constitution of West Virginia, forfeited to said state December 31st, 1888, and that by reason of said forfeiture, and the proceedings had thereunder, the title to the tracts of land in litigation in this particular suit, vested in one Joseph Hatfield, under whom the defendants claim.

The demurrer further shows that it being provided by the act of the Legislature of West Virginia of February 28th, 1893, under which suit was brought in which complainant claims to have redeemed the land claimed by him, that the suit should be dismissed as to any land that appeared to have been sold in any proceeding for the sale of school land, and, therefore, said suit could not properly be maintained, nor any degree of redemption properly entered that should effect the lands claimed by these defendants, under the sales to said Joseph Hatfield, by the commissioner of school lands, and, therefore, complainant ought not to maintain this suit.

This demurrer was overruled and leave given to the defendants to file their answer. Flesher, as counsel for the defendants, declined to file an answer, but elected to stand on the demurrer. The final decree was entered June 2nd, 1900, and some time later an order allowing appeal to this court.

Now comes a number of petitioners, all of whom claim title to land within the said 50,000 acre tract, and charge that the suit was fraudulent and fictitious from the beginning; that while Henry C. Flesher claims to be the attorney for the defendants, he is, in fact, the agent and attorney for the plaintiff, Henry C. King, and that he was never authorized or empowered to represent the defendants, or either of them in this suit.

This proceeding was brought to the attention of the officers of the State of West Virginia by the direct order of this court. Recognizing that the questions sought to be raised in

this cause, have an important bearing upon the revenues of the state, involving, as they do, a direct attack upon the constitution and statutes, and affecting the title to a very large area of land, the legislature authorized and directed the board of public works of the state to employ its attorney general and other counsel, if deemed advisable, to appear in behalf of the state. Being then Attorney General of the State of West Virginia, the board of public works, in pursuance of said action of the legislature, authorized and directed me to appear in this court to make such defense in this cause, and to take such action as, in my opinion, might be necessary to uphold the constitutional provisions aforesaid, and to maintain and preserve the property rights of the citizens of this state, vested in them by reason of the operation of said constitutional provisions and the statutes enacted thereunder.

As counsel for the state, I proceeded to examine the record in the case for the purpose of upholding, to the best of my ability, the validity of the constitutional provisions and statutes in question. Naturally, I first inquired into the history of the cause and the proceedings had in the Circuit court. Upon such investigation I was fully convinced that the suit was fictitious and fraudulent from the beginning, and that the sole purpose of said suit was to secure from this court a decision to subserve the interest of the plaintiff below. I was further convinced that Attorney Henry C. Flesher had no authority to appear for the defendants in the lower court, and that his appearance was in collusion with the attorney for the plaintiff. In other words, I am convinced that the allegations made in the petitions of the various claimants are true, and that the evidence collected and filed as exhibits in support of these petitions, so change the nature of this suit, that it is not only necessary, but that it would be even improper for me to prepare a brief in this proceeding defending the constitutional provisions and statutes in question.

If my view of the facts is correct, an unbroken line of decisions of this court shows that it will have no hesitancy in

dismissing this appeal, annulling the decree entered in this cause in the Circuit Court of the United States for the District of West Virginia, and setting aside all proceedings had herein in the said court, without considering the merits of the case.

ARGUMENT.

By a long line of decisions, this court has held that upon a motion, it will intervene and dismiss an appeal when it clearly appears that the suit is fictitious and that there is no real issue between the parties.

In the case of East Tennessee, Virginia & Georgia R. R. Co. vs. Southern Telegraph Company, 125th United States, 695, the court held: "It having been shown to this court that there does not any longer exist any real controversy between the parties to this suit about the matter originally involved, and that, by arrangement, the defendant in error is no longer a contestant in the cause, the court, after notice to the parties and hearing, dismissed the case with cost."

Again the court held in South Spring Hill Gold Mining Company vs. The Amador Medean Gold Mining Company, 145th United States, 302: "This court will not consent to determine a controversy in which the plaintiff in error has become the *dominus litis* on both sides."

American Wool Paper Company vs. Jacob B. Heft, 8th Wallace, 333; Henry S. Little, Receiver, vs. Samuel B. Bowers, et al., 134th United States, 547, are decisions to the same effect.

In People of the State of California vs. San Pablo & Tulare Railroad Company, 149th United States, 308, the court used the following language: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide

moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which can not affect the result as to the thing in issue before it. No stipulation of parties or counsel, whether in the case before the court, or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

From these decisions it clearly appears that this Honorable Court does not sit to determine moot questions for the gratification of private parties, or to subserve private interests. It can not afford thus to encourage litigation. Its duty is to determine disputed questions, when disputants fail to arrive at an agreement. It has always refused to hear and determine suits where there is no issue at stake. This proposition being true, how much more ought this court to refuse to hear a cause that was conceived in fraud, and conducted in such a clandestine manner as to elude the vigilance of active attorneys, who were employed to defend suits instituted by the same plaintiff for the purpose of recovering lands claimed under the same title? If this court has in the past refused to encourage litigation by hearing cases that were honestly instituted to determine actual disputes, but which were subsequently settled before the time set for hearing in this court, how much more ought it refuse to sit on issues fraudulently made by designing individuals, thus hoping to secure a decision that would subserve them in carrying into effect some nefarious scheme? That such is the object of this suit clearly appears from the exhibits filed with the petition in this cause.

Again the decisions of this court, in many instances, hold: "Where it appears to this court from affidavits or other evidence, filed by persons not parties to a suit, that there is no real dispute between the plaintiff and the defendant in the suit, but on the contrary that their interests is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the Circuit court entered *pro forma* is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed." Lord vs. Veazie, 8th Howard, 251.

In this same cause Chief Justice Taney, in delivering the opinion of the court, said: "It is the office of courts of justice to decide the rights of persons and of property when the persons interested can not adjust them by agreement between themselves—and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court." In the same case the court further says: "A judgment in form thus procured, in the eye of the law, is no judgment of the court. It is a nullity and no writ of error will lie upon it."

Chamberlain vs. Cleveland, 1st Black, 419, is a similar case to the one above. The court affirmed the doctrine by using substantially the same words in the syllabus, as is used in the syllabus of the case of Lord vs. Veazie, and further said: "There is no material difference between this case and that of Lord vs. Veazie, 8th Howard, 254, when the whole proceeding was justly rebuked by the court, as in contempt of the court and highly reprehensible." Again the court, in the same case, said: "We repeat, therefore, what was said by the court in that case, 'Any attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law which a party desires to know for his own interest, or his own purpose, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court.'"

If this court holds it highly reprehensible and a contempt of court for an individual to carry on both sides of a suit for the purpose of obtaining a decision to advance his personal interests, how much more aggravated is the case at bar, where the party, in order to carry on both sides of the

case, goes, by attorney, to innocent women, who are ignorant of their rights and of the law applicable to their rights, and fraudulently makes representations for the purpose of obtaining a colorable right to appear for them in a suit, whose only end is to secure a decision from this court favorable to his contention, which will give him an advantage over other parties with whom he has litigation? To all intents and purposes no assent was ever given, and this is a case similar to those cited above, in so far as its being a proceeding carried on by one party, but differs in the respect of its being aggravated by the fraud of the attorneys who claimed to represent the parties to this suit. It is clearly apparent that the only purpose the plaintiff had in view was to secure a decision from this court, and that by default, that would be of service to him in securing other lands, the title to which he claims, in the same neighborhood.

The court felt called upon to say in Chamberlain vs. Cleveland, supra: "It is but proper to say that the counsel who have been employed in this case are entirely acquitted of any participation in the purpose of the party." But in the case at bar no such excuse can be made for the attorneys. They, indeed, it seems, are the guilty parties, and if the court felt called upon to make explanation clearing the attorneys in the above case from blame, it certainly will not hesitate in this case to punish the counsel who have been deliberately guilty of such an offense. If it is a "punishable contempt of court" for a private party to carry on both sides of a suit, how much greater offense is it for a practicing attorney to fraudulently carry on a suit to secure from the court a decision favorable to the interest of his client.

I wish particularly to call the attention of the court to the cause of Nelson F. Shelton vs. Clayton Tiffin & Lilburn P. Perry, 6th Howard, 163, as one which I consider very strong and very pertinent on this subject. Justice McLean, in delivering the opinion of the court, made the following statement of the case, which I quote in full:

"This is an appeal in Chancery from the Circuit court

for the Eastern District of Louisiana.

"On the 10th of April, 1838, the complainant below sold to one Samuel Anderson a plantation and negroes, situated in the Parish of Madison, Louisiana, for seventy-five thousand dollars. Thirty-five thousand dollars of this sum were paid in part, by surrendering a note which Anderson held against Lilburn P. Perry, the complainant, and his father, John H. Perry, for thirteen thousand dollars; and by the assignment of a note on H. R. Austin, J. B. Ragan and Wylie Bohannan, of the state of Mississippi, for eighteen thousand, two hundred and eighty-two dollars and sixty-five cents, payable to Samuel Anderson on the 1st of April, 1839.

"A mortgage was executed on the plantation and slaves to secure the payment of forty thousand dollars, the residue of the purchase money. At the same time three notes or bonds were executed to Lilburn P. Perry by Samuel Anderson, each for the sum of thirteen thousand, three hundred and thirty-three dollars, payable on the 1st day of January, 1842, 1843 and 1844.

"On the 11th day of January, 1839, Mosely & Bouldin, citizens of Virginia, instituted a suit in the Circuit court against L. P. Perry and John M. Perry and obtained a judgment against them for seven thousand, five hundred dollars. An execution was issued, in virtue of which, under the laws of Louisiana, the marshal levied upon the three notes above stated and the mortgage, which were sold by him, on credit of twelve months to Samuel Anderson, the mortgagor, for five thousand dollars.

"Some time after this purchase, Robert Anderson, the father of Samuel, and Nelson F. Shelton, his uncle, having procured a judgment against Samuel Anderson in the State Court of Lousiana, sold the mortgage property and slaves, and they became the purchasers thereof and have the possession of the plantation and slaves under the purchase, claiming that the mortgage by Anderson to Perry has been extinguished.

"The decree of the Circuit court was entered against Samuel Anderson, Robert Anderson and Nelson F. Shelton et al., that within sixty days they should pay to the complainant forty thousand dollars, with interest from the 1st day of January, 1842, and in default of such payment that they should deliver to the complainants the possession of the plantation and the slaves. From this decree Shelton only has appealed."

The court said: "The greatest question in the case arises out of the judicial sale of the mortgage debt to Anderson, the mortgagor, under a judgment obtained by Mosely & Bouldin against L. P. Perry and John M. Perry. If by this sale the mortgage debt has been extinguished, no relief can be given to the complainants.

"Had the Circuit court which rendered the judgment jurisdiction of the case? The plaintiffs were citizens of Virginia, John M. Perry was a citizen of Louisiana, and L. P. Perry, of Missouri. No process was served upon L. P. Perry, nor does it appear that he had notice of the suit until long after the proceedings were had. But there was an appearance by counsel for the defendants and defense was made to the action. This being done by a regular practicing attorney it affords *prima facie* evidence, at least, of an appearance in the suit by both the defendants. Any individual may waive process, and appear voluntarily."

John M. Perry acted in some matters as the agent of L. P. Perry, and wrote his attorney, one Mr. Crawford, that he would see upon the records of the Court of the United States a suit commenced against him and others by H. Mosely & Bouldin, and his wish to employ him to defend it. Crawford, the attorney, testified that he had no recollection of having received any authority directly from L. P. Perry, or from any one in his behalf, to defend the suit other than what might be inferred from this letter, "that he regards his appearance on behalf of any other person than John M. Perry in said suit as an inadvertance on his part." The court said this evidence does not contradict the record but

explains it, and further said: "An appearance by counsel under such circumstances, to the prejudice of the party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity and, consequently, did not authorize the seizure and sale of his property."

In the syllabus of the case the court laid down the law as follows: "Where a citizen of Virginia sued, in the court of Louisiana, two persons jointly, one of whom was a citizen of Louisiana and the other of Missouri, and an attorney appeared for both defendants, the citizen of Missouri is at liberty to show that the appearance for him was unauthorized. If he shows this, he is not bound by the proceedings of the court, whose judgment as to him is a nullity."

In the light of these decisions this court will hardly hesitate to grant the petition of the State of West Virginia.

I deem it unnecessary to enter into any lengthy discussion of the law governing the disbarment of attorneys.

This court has held that the power to disbar an attorney "is possessed by all courts who have authority to admit attorneys to practice." Ex parte James S. Robinson, 19th Wallace, 505.

Again it has held in Randal vs. Brigham, 7th Wallace, 503, that "it is not necessary that proceedings against attorneys for mal-practice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from his own observation. Some times they are moved by third parties upon affidavits; and some times they are taken by the court upon its own motion. All that is requisite to their validity, is that when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and

defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

As to what grounds are sufficient to warrant the disbarment of an attorney, I understand it to be largely a matter within the breast of the court. The general rule stated in the American and English Encyclopedia of Law, Second Edition, Vol. 3, Page 302, is as follows: "In order for any acts or conduct to be ground for striking the name of an attorney from the rolls, it is not essential that they be such as would subject him to indictment or to any civil liability; any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relation of attorney and client and the practice of law before the courts, or showing such a lack of personal honesty, or of good moral character as to render him unworthy of public confidence, constitutes a ground for his disbarment."

The standard of integrity laid down by this court, in Randall vs. Brigham, cited above, is as follows: "The confidence which they (meaning attorneys) receive and the responsibility which they are obliged to assume, demand, not only ability of high order, but the strictest integrity."

I deem it unnecessary to point to the numerous cases in the law books where courts, in the exercise of their summary jurisdiction, have ordered the names of attorneys to be stricken from the rolls. The case at bar is so clear that I feel that I can leave it to the court without further comment as to whether the attorneys in this case measure up to the standard laid down by this court, or measure up to the standard that should govern attorneys practicing in this, the highest court of our land.

On the whole, I most respectfully submit that each and every point of the motion made by the State should be sustained.

EDGAR P. RUCKER,
Counsel for the State.

AUTHORITIES CITED.

East Tennessee, Virginia & Georgie Railroad Company vs. Southern Telegraph Company. 125th United States, 695.

Spring Hill Gold Mining Company vs. The Amador Medean Gold Mining Company. 145th United States, 302.

American Wool Paper Company vs. Jacob B. Heft. 8th Wallace, 333.

Henry S. Little, Receiver, vs. Samuel B. Bowers et al. 134th United States, 547.

People of the State of California vs. Pablo & Tulare Railroad Company. 149th United States, 308.

Lord vs. Veazie. 8th Howard, 251.

Chamberlain vs. Cleveland. 1st Black, 419.

Nelson P. Shelton vs. Clayton Tiffin and Lilburn P. Perry. 6th Howard, 163.

Ex parte James S. Robinson. 19th Wallace, 505.

Randall vs. Brigham. 7th Wallace, 503.

American and English Encyclopedia of Law. Second Edition, Vol. 3, Page 302.

No. 221.

Affidavits in Rebuttal.

Filed Dec. 5, 1901.

Office Supreme Court U.S.
FILED
DEC 5 1901
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. BUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

AFFIDAVITS IN REBUTTAL OF THOSE OF MAYNARD F. STILES, H. K. SHUMATE, HENRY C. FLESHER, AND OTHERS.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

Affidavits in Rebuttal of Those of Maynard F. Stiles, H. K. Shumate, Henry C. Flesher, and Others.

STATE OF WEST VIRGINIA, *Mingo County,* } *To wit:*

Aley Browning, being first duly sworn, on her oath says: "I am fifty-seven years old, and reside on Ben creek, in Mingo county, West Virginia, at the home of my sister, Sarah D. Hatfield, on the lands of which Joseph Hatfield died seized, and have lived at that place with my sister continuously from the year 1870 until the present, except about one year, beginning in October, 1896."

Affiant further says: "I distinctly remember that some time in 1895 Mr. H. K. Shumate came to our house on Ben creek in company with a man he introduced as Judge Stiles, and that said Stiles and my sister, Sarah D. Hatfield, had a

long talk in the parlor and alone. Mr. Shumate was out, about the place somewhere, and was not present at the time of this conversation. I was engaged at house-work and did not hear the conversation between my sister and the said Stiles, but my sister told me what had occurred between her and the said Stiles, either the same evening of the conversation or the next morning. Mr. Shumate and Mr. Stiles staid all night with us.

"I have today heard read the affidavit of my sister, Sarah D. Hatfield, filed in the case of S. D. Hatfield and Nancy C. Rutherford against Henry C. King, pending in the Supreme Court of the United States, and I here state that the conversation between my said sister and Mr. Stiles, as given in her said affidavit, is, in all respects, the same as was detailed to me by her as having occurred between the said Stiles and her in the parlor, as above stated.

"I am told that Mr. Stiles denies that he was present at our house in company with Mr. Shumate at the time of the arrangement referred to in my sister's affidavit above mentioned. In this Mr. Stiles is mistaken, for I distinctly remember that both Mr. Stiles and Mr. Shumate were at our house and remained overnight on the occasion when my sister, Sarah D. Hatfield, told me of the arrangement she and said Stiles had made while in consultation in our parlor, which arrangement is set out in my sister's affidavit aforesaid.

"My sister and I live alone at the Hatfield home, on the head of Ben creek, five miles from the station, Wharncliffe, on the Norfolk and Western railroad.

"ALEY BROWNING."

Taken, sworn to, and subscribed before me this the 14th day of November, 1901.

J. M. HATFIELD,
Notary Public in and for Mingo County,
West Virginia.

STATE OF WEST VIRGINIA, } *To wit:*
Mingo County, }

T. H. Graham, being first duly sworn, upon his oath says that during the years 1895 and 1896 I worked for Mrs. Sarah D. Hatfield and lived at her house, known as the "Joseph Hatfield" home, on the head of Ben creek, in Mingo county West Virginia. I remember seeing M. F. Stiles, whom I knew as Judge Stiles, at the house of Mrs. Hatfield during the year 1895, with H. K. Shumate, and on another occasion when Mr. Shumate was not with him. Judge Stiles and Mr. Shumate, on the first occasion referred to, remained overnight at the house of Mrs. Hatfield. On the occasion when said Shumate and Stiles remained overnight at Mrs. Hatfield's, and I think the next morning, Mrs. Hatfield told me of an arrangement she had made with Judge Stiles about her land and the defense of her title in the suit that Henry C. King had brought against her.

I have today heard read the affidavit of Sarah D. Hatfield, made on the 30th day of September, 1901, filed in the case of S. D. Hatfield and Nancy C. Rutherford against Henry C. King, pending in the Supreme Court of the United States, which affidavit in part sets forth the arrangement that Mrs. Hatfield made with Judge Stiles on the occasion of his visit in company with Mr. Shumate to her house, and I here state that Mrs. Hatfield told me of that arrangement on the morning of their visit after they had remained overnight, and that the same as set forth in her affidavit is in all substantial respects the same as she related it to me at her house on the occasion referred to.

T. H. GRAHAM.

Taken, subscribed, and sworn to before me, as witness my hand and seal this 22d day of November, 1901.

[SEAL.] JAS. DAMRON,
Notary Public for Mingo Co., W. Va.

STATE OF WEST VIRGINIA, *Mingo County,* } *To wit:*

Crockett Allison, being first duly sworn, upon his oath says:

"I am 41 years of age, and live on Ben creek, in Mingo county, West Virginia, where I was born and raised. I am a merchant and timberman. I am acquainted with Sarah D. Hatfield and have known her about all my life. I am also acquainted with John A. Sheppard and have known him since 1888. I have seen and read the affidavits of Sarah D. Hatfield and John A. Sheppard in the case of Sarah D. Hatfield and Nancy C. Rutherford against Henry C. King, pending in the Supreme Court of the United States, and I here state that the conversation between said Sheppard and Mrs. Hatfield, as set forth in Sheppard's affidavit aforesaid, is a true statement of what occurred between Mrs. Hatfield and myself and between Mrs. Hatfield and the said Sheppard in my presence, and that the statement in the affidavit of said Sheppard contained is a correct and true statement of all that occurred between Mrs. Hatfield and me and between Mrs. Hatfield and said Sheppard in my presence.

"CROCKETT ALLISON."

Taken, subscribed, and sworn to before me, as witness my hand and seal this 23d day of November, 1901.

[SEAL.] JAS. DAMRON,
Notary Public.

Supreme Court U.S.
FILED
MAY 2 1902
JAMES H. McKENNEY,
Clerk.

No. 221.

Motion to amend decree.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed May 2, 1902.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

v.

HENRY C. KING.

MOTION.

S. D. HATFIELD and
NANCY C. RUTHERFORD,
By W. P. HUBBARD,
C. W. CAMPBELL,
HOLMES CONRAD,
Their Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2023

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

v.

HENRY C. KING.

S. D. Hatfield and Nancy C. Rutherford, appellants in the above-entitled cause, in which the opinion and judgment of this court were delivered on the 24th day of February, 1902, come again, by counsel, and move the court to so amend its order remanding said cause to the circuit court as that the same may, by its express terms, provide that the cause "be remanded to the circuit court of the United States for the southern district of West Virginia," and for grounds of said motion they assign the following, viz:

(1.) By act of Congress approved January 22, 1901 (56 Congress, sess. 2, chap. 105), entitled "An act to divide the State of West Virginia into two judicial districts," it is provided in section 8:

> "And all causes and proceedings of every name and nature, civil and criminal, now pending in the courts of the judicial district of West Virginia as heretofore constituted, whereof the courts of the southern judicial district of West Virginia, as hereby

> constituted would have had jurisdiction if said district, and the courts thereof had been constituted when said causes and proceedings were instituted, shall be, and are hereby transferred to and shall be proceeded with in the southern judicial district as hereby constituted and jurisdiction thereof is hereby transferred to and vested in the courts of the said judicial district of West Virginia, and the records and proceedings therein and relating to said proceedings and causes shall be certified and transferred thereto."

With a proviso thereto—

> "that all motions and causes submitted and all causes and proceedings, both civil and criminal, including proceedings in bankruptcy, now pending in said judicial district of West Virginia, as heretofore constituted, in which the evidence has been taken in whole or in part, before the present district judge of the judicial district of West Virginia, as heretofore constituted, or taken in whole or in part and submitted and passed upon by said district judge, shall be proceeded with and disposed of in said northern judicial district of West Virginia, as constituted by this act."

That the final decree in this cause was made on the 2d day of June, 1900, and the order allowing the appeal therefrom to this court was made on the 1st day of December, 1900, and the cause was pending on appeal in this court when the act of Congress of January 22, 1901, was passed and became the law.

That this case does not fall within any of the conditions recited in the proviso to that act, because there was no evidence taken in the cause, and the district judge did not pass upon any evidence in his adjudication of the cause, but that the same was apparently submitted and was decided on a demurrer to the bill alone.

(2.) That the order remanding the cause to the circuit court instructs that court "to set aside the decree as well as

the appearance of defendants, and to proceed thereafter in accordance with law; and also to make a full investigation, in such manner as shall seem to it best, of the various charges of misconduct presented in the motions filed in this court, and to take such action thereon as justice may require."

This order does not expressly indicate to which of the two recently created judicial districts of West Virginia the cause is remanded, but in the opinion of the court it is said:

> "It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross-examination be had in his presence."

The judge who presided in the circuit court, where the wrong was alleged to have been done, was the Honorable J. J. Jackson, who is now the judge of the newly created district of West Virginia, known as the northern district.

This cause is one which, under the conditions prescribed by the act creating the new districts, falls within the southern district and is within the jurisdiction of the circuit court for the southern district of West Virginia. The circuit court for the northern district of West Virginia never had jurisdiction of the cause, and under the act of Congress it would seem that exclusive jurisdiction thereof was conferred upon the circuit court for the southern district. If, upon the consideration of this motion, it should be ascertained that the court of the northern district has not jurisdiction in the cause, it is respectfully submitted that the order should be amended so as to indicate the circuit court of the southern district as the one to which the cause is remanded.

(3.) There are two objections to having the investigation suggested conducted under the supervision of Judge Jackson,

who presided in the circuit court at the hearing of the cause, which it may be indelicate more fully to indicate, but which his opinion in this case and the affidavit of Mr. Flesher may perhaps render apparent to the discriminating reader.

Appellants, through their counsel, submit the motion to have the order of this court so amended as to require that the cause be remanded to the circuit court of the southern district of West Virginia, where it properly belongs, and where the district judge, sitting, it may be, with Judge Goff, will render dispassionate and sound justice.

S. D. Hatfield and
Nancy C. Rutherford,
By W. P. Hubbard,
C. W. Campbell,
Holmes Conrad,
Their Counsel.

Office Supreme Court U. S.
FILED
MAY 9 1902
JAMES H. MCKENNEY
Clerk.

No. 221.

Add'l Brf. of Conrad for Appt.
(On mo. to amend)

Supreme Court of the United States

OCTOBER TERM, 1901.

Filed May 9, 1902.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

The counsel for appellee has obtained leave to present his objections to the motion submitted to the court, to so amend the order made in the case as to direct that the case be remanded to the circuit court for the southern district of West Virginia. What the grounds of his objection may be can only be now conjectured.

Whether the case be remanded to the northern or to the southern district must depend altogether upon which of these districts would have had jurisdiction of the case "if said district and the courts thereof had been constituted when said cause and proceedings were instituted."

By the act of Congress of January 22, 1902, dividing West Virginia into two judicial districts, the counties of West Virginia which constitute the two several judicial districts are specifically designated.

In the category of counties constituting the southern dis-

trict appears the county of Kanawha, in which lies the city of Charleston, the capital of the State.

The circuit court of West Virginia, as originally constituted, had several places of session in that State; among these places was Charleston; and the first inquiry here is, Was this case pending in the circuit court of the United States for the district of West Virginia, at CHARLESTON?

If obscurity exists in the original record on this point it is to be attributed to the very irregular manner in which the case got upon the docket of the court at all. It was never at rules. It was never in the clerk's office. No entry exists of the institution of the suit The bill of complaint and the demurrer of the self-constituted attorney for the appellants were placed together in the hands of the judge, who proceeded with zeal to prepare his elaborate opinion and judgment.

The obscurity which veils the transaction is not, however, altogether impenetrable. Some rays of light gleam from the record.

On page 47, original record, appears the appeal bond, in which it is recited that the case was pending at Charleston.

In the pamphlet entitled "Petitions and Exhibits" will be found, on page 84, "Exhibit No. 17," which is the certificate of the clerk of the newly erected court of the southern district, from which it appears that the record and papers of this case are in his custody as such clerk. There is on the next preceding page another certificate of the same clerk, filed as "Exhibit No. 16," from which it appears that the ejectment suit for these same lands was pending in the court at Charleston. Again, in the affidavit of U. E. Chilton, "Exhibit No. 2," it is stated, on page 43, that "the said Henry C. King instituted a suit in equity in the circuit court of the United States for the district of West Virginia, at Charleston, against one Sarah D. Hatfield and Nancy C Rutherford," &c. Again, on page 61 of "Petitions and Exhibits," appears the declaration in ejectment, brought by

Henry C. King against these two defendants, by his attorney, Maynard F. Stiles, with the notice thereto that declaration will be filed "in the office of the clerk of said circuit court at Charleston, West Virginia," on the first Monday of March, 1895."

These are meager, but, under the circumstances, sufficient proof of the fact that this case was pending in the court at Charleston, and hence falls to the court for the southern district of West Virginia.

If, under the act of January 22, 1902, this case is found to fall among those which belong to the southern district of West Virginia and is not subject to the terms of the proviso to that act, then it should be remanded from this court to the southern district, to be further proceeded in by the circuit court of that district. It may doubtless be true that it is the strong desire of counsel for appellant that his honor Judge Jackson should be afforded the opportunity of dealing with the parties and with their case, with which he has acquired such familiarity and has evinced such profound interest, and between whom and the counsel for the appellant there exists such close and tender relations. But we would proceed decently and in order. The object of the case is set forth in the original bill. The conduct of the attorneys is a mere incident in the proceeding. If contempt of court has occurred, it is of the court, and not of the individual judge who presided in the court. The court survives and can deal with that matter as may appear proper, whoever may be the judge who presides in the court.

HOLMES CONRAD,
For Appellants, So Called.

Supreme Court of the United States.

No. 221.—October Term, 1901.

S. D. Hatfield and Nancy C. Rutherford, Appellants, *vs.* Henry C. King. } Appeal from the Circuit Court of the United States for the District of West Virginia.

[February 24, 1902.]

On October 8, 1898, the appellee commenced this suit in the Circuit Court of the United States for the District of West Virginia to quiet his title to certain lands. In the bill he alleged that he was the owner in fee and in the actual possession of a large tract, known as the "Robert Morris 500,000 Acre Grant," which was granted by Virginia in 1795 to Robert Morris, of Philadelphia, and is situated partly in West Virginia, and partly in Kentucky and Virginia. He followed this general allegation with a detailed statement of his chain of title and of certain tax proceedings. After these averments, tending to show his own rights and title, he charged that Aly and Joseph Hatfield, father and son, had at different times obtained pretended titles to certain small tracts within the limits of his grant, stating how these titles were obtained and wherein he claimed they were invalid. He further averred that both the Hatfields were dead; that their only heirs were the two defendants, now appellants, the widow and daughter of Joseph Hatfield, who wrongfully claimed the tracts last mentioned and thereby cast a cloud upon the plaintiff's title. No process was issued, but on June 8, 1899, a demurrer was filed on behalf of the defendants, signed by one appearing as their attorney. This demurrer was overruled on May 16, 1900, and leave given to file answer. Thereupon, as the record states, the defendants declined to answer but elected to stand upon their demurrer, and on June 2, 1900, a decree was entered in favor of plaintiff, quieting his title to the lands claimed by the defendants. From this decree an appeal was prayed and allowed to this court, and the appeal papers were filed here on January 3, 1901.

The bill was so framed as to invite a consideration, in some aspects, of the question of forfeiture for non-payment of taxes, presented to this court in *King* v. *Mullins*, (171 U. S. 404.)

At the beginning of this term one of the appellants, Nancy C. Browning, (erroneously, as she states, called Nancy C. Rutherford in the record,) moved for a rule against the attorney who had appeared for her, to show by what authority he had assumed to so appear and why he should not be attached and his name stricken from the roll of attorneys for

falsely assuming to act as her attorney and imposing upon the circuit and this court a false, fictitious and manufactured case for the purpose of obtaining an opinion and judgment on a false statement of facts, to her injury and the injury of others similarly situated but not parties to the suit or appeal. She also asked that the alleged final decree of the Circuit Court be declared null and void, and that this appeal and the cause be dismissed. At the same time other parties, claiming to be interested in the Robert Morris tract, appeared and represented that the entire proceedings had in this case were feigned and fictitious; that the litigation on both sides was controlled by the counsel for the plaintiff King, and asked an examination as to the truth of the charge so made. A substantially similar motion was made on behalf of the State of West Virginia. The counsel named in the record have answered, denying these charges and asserting the fullest integrity in the matter. Quite a number of affidavits have been filed and also some documentary evidence presented.

Mr. Justice BREWER delivered the opinion of the Court.

It is contended by the appellants that the decree in the Circuit Court against them ought to be set aside because they have not had the hearing in that court to which they were entitled by law; that they were not served with process; that counsel unauthorized by them entered their appearance, and after having wrongfully entered their appearance failed to take the proper steps for the protection of their rights.

It is also contended (though by other parties than the appellants) that there was no real controversy between the parties nominally opposed to each other, and that the litigation was in fact carried on under the direction and control of the plaintiff. It is well settled that questions of this kind may be examined, upon motion, supported by affidavits, and that it is the duty of a court to make such inquiry, in order that it may not be imposed on by an apparent controversy to which there are really no adverse parties (*Shelton* v. *Tiffin*, 6 How. 163, 186; *Lord* v. *Veazie*, 8 How. 251; *Cleveland* v. *Chamberlain*, 1 Black, 419, 426; *Wood Paper Company* v. *Heft*, 8 Wall. 333; *Tennessee &c. Rd. Co.* v. *Southern Tel. Co.*, 125 U. S. 695; *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *California* v. *San Pablo &c. Railroad*, 149 U. S. 308.)

In *Cleveland* v. *Chamberlain*, it was said, quoting from *Lord* v. *Veazie*: "Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court."

In *Shelton* v. *Tiffin*, the question was as to the validity of a judicial sale, and it appeared that one of the defendants in the proceedings had not been served with process; that an attorney had entered an appearance for him but had done so inadvertently and without authority, and it was said: "An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property."

If it be true, as claimed by some of the moving parties, that this is a collusive suit, that there is no real controversy between the plaintiff and defendants, that the plaintiff has been controlling the litigation on both sides with a view of obtaining an opinion on a matter of law in which he is interested, the transaction is one which as stated courts of justice have always reprehended, and should be treated as a punishable contempt, and no decree entered under those circumstances should be permitted to stand.

So far as respects permitting the decree to stand, the same result would follow even though there were no collusion, if the appearance of counsel was, in fact, not authorized or ratified by the defendants; and to that matter alone shall we direct our attention.

Before any proceedings could rightfully be taken against the defendants it was essential that either they be brought into court by service of process or that a lawful appearance be made in their behalf. Confessedly they were not served with process, and they now deny the right of counsel to have entered an appearance for them. The evidence upon this, as well as kindred questions, is principally in *ex parte* affidavits. The appellants were respectively the widow and daughter of Joseph Hatfield, and claimed title to the various tracts by inheritance from him. It appears that in 1895 an action of ejectment was brought by King against several parties, these appellants among the number. Mrs. Hatfield was led to employ in that case the same counsel who entered her appearance in this. We do not stop to inquire into the circumstances which it is alleged attended that employment. She swears that it was simply for that action and a suit ancillary thereto brought to enjoin the cutting of timber; that she never employed him in any other matter, and knew nothing of the pendency of this suit until after the decree against her and the appeal to this court. She also swears that she never attempted to act for her daughter in preparing for the defense of any suit or action, or in making any arrangements for her. Mrs. Browning testifies that at the time of the ejectment suit she was the widow of John Rutherford; that on December 25, 1895, she married her present husband, Albert Browning;

that she had no notice or knowledge of the present suit, and never directly or indirectly employed or authorized any one to appear for her therein, or in any other controversy or matter pertaining to said lands; and further, never authorized any person to employ said counsel or any other attorney to appear and represent her in this suit.

On the other hand, the counsel's affidavit is that he was employed by Mrs. Hatfield in the prior action, and supposed he was authorized by the scope of that employment to appear for her in this suit; that he had the title papers of both the appellants in his possession and had no suggestion of any revocation of his authority. He introduced a copy of a letter from Mrs. Hatfield, which supported his claim of employment, at least in the ejectment case. While he testifies to having met and conversed with Mrs. Hatfield, he does not state that he ever met Mrs. Browning or had any conversation or correspondence with her, although he does state in a general way that she sanctioned and ratified the action of her mother in employing him.

We do not deem it necessary to mention all the matters of evidence, but it seems to us quite clear that, whatever may have been his understanding of the matter, the counsel was not authorized to appear for Mrs. Browning. She had in fact never employed him in any litigation in respect to these lands or otherwise, nor had she authorized any one to employ him, and she had no notice of the pendency of this suit. As to Mrs. Hatfield, while she did at one time employ him in other litigation, she knew nothing of the pendency of this suit until after the decree and the appeal, and if the employment in the ejectment action was sufficiently broad to cover all future litigation of any kind in respect to the land, it would seem to have been so only in consequence of a contract which she says was made, and which, if made, would stamp the whole transaction with wrong.

We do not stop to inquire whether the course pursued by counsel was under the circumstances the best that could have been taken for the protection of the appellants' rights. They were entitled to notice of the pendency of the suit; to select such counsel as they chose and to be guided by his advice and judgment, even though that advice and judgment should prove to be erroneous.

We have refrained from spreading upon our records a detailed statement of the charges and countercharges made in the various motions and affidavits that have been filed, and have only referred to so much as seemed necessary for the present disposition of the case. But our reticence in this respect must not be taken as expressive of a purpose to ignore them. The charges are serious ones, affecting the integrity of counsel, commended, by the fact of admission to the bar of the Circuit Court, to the confidence of the community. They involve the due administration of justice in that court and cannot be passed without notice and action. It is not enough that the doors of the temple of justice are open; it is essen-

tial that the ways of approach be kept clean. We refrain from extended comment because, as, heretofore stated, the testimony is mainly by *ex parte* affidavits, which are often, this case being no exception, quite unsatisfactory, and it is only through the sifting process of cross examination that the real facts can be disclosed. When the truth is ascertained, if there be wrongs as charged, the language of judicial condemnation should be clear and emphatic, and a punishment inflicted such as the wrongs deserve; and if no wrong has been done the conduct of counsel will be cleared from suspicion. It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross examination be had in his presence.

The order, therefore, is that this case be remanded to the Circuit Court, with instructions to set aside the decree as well as the appearance of defendants, and to proceed thereafter in accordance with law; and also to make a full investigation, in such manner as shall seem to it best, of the various charges of misconduct presented in the motions filed in this court, and to take such action thereon as justice may require.

Mr. Justice HARLAN was not present at the argument of this case and took no part in its decision.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 221.—October Term, 1901.

S. D. Hatfield and Nancy C. Rutherford, Appellants, *vs.* Henry C. King. } Appeal from the Circuit Court of the United States for the District of West Virginia.

[June 2, 1902.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

In this case a decree was entered in favor of King on June 2, 1900, in the Circuit Court for the District of West Virginia, from which an appeal was allowed to this court, and the case docketed, and the record filed, January 3, 1901. Subsequently certain motions were made, on the submission of which it was contended by appellants that the decree against them ought to be set aside because they had not had the hearing in that court to which they were entitled by law; that they were not served with process; and that counsel, unauthorized by them, had entered their appearance. The matter was submitted November 11, 1901, and decided February 24, 1902. *Hatfield* v. *King*, 184 U. S. 162. Our decree remanded the cause "to the Circuit Court of the United States for the Northern District of West Virginia, with directions to set aside the decree as well as the appearance of defendants, and to proceed thereafter in accordance with law; and also to make a full investigation, in such manner as shall seem to it best, of the various charges of misconduct presented in the motions filed in this court, and to take such action thereon as justice may require."

In the course of the opinion it was said: "It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross-examination be had in his presence."

After the case had been docketed, and on January 22, 1901, an act was approved, which divided the State of West Virginia into two judicial districts, called the Northern and Southern Judicial Districts, and provided that the District Judge of the District of West Virginia in office at the time the act took effect should be the District Judge for the Northern Judicial District of West Virginia as thereby constituted. 31 Stat. 736, c. 105.

By the eighth section of the act it was provided that causes and proceedings then pending in the courts of the District of West Virginia,

which would have been cognizable in the courts of the Northern Judicial District as created by the act, were transferred to that district; and similarly as to pending causes and proceedings falling within the new Southern District.

This proviso was added: "Provided, that all motions and causes submitted and all causes and proceedings, both civil and criminal, including proceedings in bankruptcy now pending in said judicial district of West Virginia as heretofore constituted, in which the evidence has been taken in whole or in part before the present district judge of the judicial district of West Virginia as heretofore constituted, or taken in whole or in part and submitted and passed upon by the said district judge, shall be proceeded with and disposed of in said northern judicial district of West Virginia as constituted by this act."

We think it sufficiently appears from the record that this case, when decided below, was pending in the Circuit Court of the United States for the District of West Virginia, at Charleston, in the county of Kanawha, a county included in the Southern District created by the act; and it involved lands situated in counties now in that District.

The decree entered by this court, February 24, 1902, remanded the cause to the Northern District of West Virginia, that the decree of the Circuit Court might be set aside, and certain proceedings be taken. A motion is now made to amend that decree so that the case may be sent to the Southern District, not only in respect of final hearing and decree on the merits therein, but also as to matters involved on the motions treated of in our previous opinion, which we considered it best should be passed on by the judge who rendered the original decree, the correctness of which view is confirmed by observations of counsel.

The motions were twofold, to reverse the decree and to remand the cause for further proceedings in accordance with law, and also to proceed against certain persons as for contempt of court. We concluded that an investigation ought to be had, and that it ought to take place in the court where the wrong was asserted to have been done, and before the judge who had been imposed upon, if the charges were correct, as to which we expressed no opinion. And we did not feel constrained by the terms of the act to remand the case to the Southern District; but on the contrary, as by the proviso, motions and causes submitted, in which the evidence had been taken in whole or in part, that is to say, matters *in gremio*, were to be proceeded with and disposed of in the Northern Judicial District, we regarded that proviso as broad enough to permit the course taken by us in the order made. While it may be said that a suit is pending even after decree rendered, yet the words "now pending," used in the eighth section, literally apply to cases remaining unheard and undecided, and no

particular provision was therein made in reference to cases pending on appeal. Nevertheless it is true that if there had been nothing more in this case than a decree by this court, affirming or reversing the decree below, the case would have been remanded to the district in which the property in controversy was situated, and in which the case would have been brought if the new District had then existed. But, as will have been seen, the case was not determined on its merits here, and proceedings were thought necessary to be taken independent of the ultimate disposition of the case. Therefore we entered the decree of February 24, and, upon further reflection, have concluded that it should not be amended.

Motion denied.

Mr. Justice HARLAN took no part in the consideration and disposition of this motion.

True copy.

Test:

Clerk Supreme Court, U. S.

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